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IN THE

# Supreme Court of the United States

October Term 1959
No. 194

[illegible] DAYAN,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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IN THE

# Supreme Court of the United States

October Term 1959

No. .....

MARVIN DAYAN,

*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

## Petition for a Writ of Certiorari to the Supreme Court of the State of California.

*To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States:*

Marvin Dayan, the petitioner herein, prays that a Writ of Certiorari issue to review the Order of the Supreme Court of the State of California entered on April 20, 1960, denying an original application of petitioner for a writ of habeas corpus directed to William H. Parker, Chief of Police of the City of Los Angeles, California, in connection with petitioner's constructive custody by said Chief of Police by virtue of a judgment, No. 98050, of the Municipal Court of the Los Angeles Judicial District, Los Angeles County, California, said judgment having been affirmed by the Appellate Department of the Superior Court of the State of California, the highest court to which an appeal can be taken.

## I.
## Opinions Below.

The Supreme Court of the State of California made its order denying the application without an opinion, the order appearing in the certified record at page 123 and in Appendix A at page 1.

## II.
## Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1257 (3).

The Supreme Court of the State of California is the court of last resort.

Article VI, Section 4, California Constitution of 1879.

The judgment of the Supreme Court denying the petition for a writ of habeas corpus was entered April 20, 1960.

## III.
## Questions Presented.

The questions presented here concern the refusal of the Supreme Court of the State of California to release the petitioner from constructive custody, the petitioner claiming that his constitutional rights of due process and equal protection of the law guaranteed by the Constitution of the United States have been violated by:

1. Petitioner's arrest and conviction, under Section 2141 of California Business and Professions Code for an alleged violation of his Chiropractic License; and
2. The denial to him of a fair and impartial trial; and
3. The denial to him of a jury trial by the conduct of the trial judge in charging the jury.

## IV.

## Statute Involved.

The Statute involved is Section 2141 of the California Business and Professions Code, being a codification of the Medical Practice Act, Section 17, but because of certain decisions of the California State Courts interpreting Section 2141, it cannot be considered alone but must be considered with Sections 1000, 1001, 4052 and 4057 of the Business and Professions Code and the Chiropractic Initiative Act codified as Sections 1000-1 to 1000-19 of the Business and Professions Code, although only Sections 1000-1, 1000-4, 1000-5, 1000-6, 1000-7, 1000-15, and 1000-18 are deemed pertinent to this matter and are either set out in the text or set out in the Appendix B at the following pages:


| *Section* | *Page* |
|---|---|
| 1000, Business and Professions Code | 22 |
| 1001, Business and Professions Code | 22 |
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Section 2141 of the California Business and Professions Code which states:

> "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid unrevoked certificate as provided in this chapter, is guilty of a misdemeanor.
>
> (Chapter refers to Medical Practice Act, Chapter 5, Business and Professions Code. Explanation of Chapter supplied)

## V.

## Statement.

It is the contention of petitioner that he was unlawfully arrested, tried and convicted and so in this statement all statements of fact are made with this contention as a factor and the words "unlawfully", etc. will not be again repeated or labored.

1. Petitioner was at the time of his arrest and now is, a Doctor of Chiropractic licensed to practice Chiropractic as taught in Chiropractic Schools or Colleges and also to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body but is not authorized to practice medicine, surgery, osteopathy dentistry or optometry, nor use any drugs or medicine now or hereafter included *in materia medica*. Certified Record page 66.

2. Petitioner was arrested May 5, 1959 for an alleged violation in three counts of Section 2141 of the California Business and Professions Code and released on $2500.00 bail and before trial in the Municipal Court and while at liberty on bail, petitioner made a series of applications for writ of habeas corpus to the Superior Court of the State of Califoria, in and for the County of Los Angeles, the State District Court of Appeal, and the Supreme Court of the State of California, all of which were denied. The applications for writs raised the same constitutional questions as are being raised here. Certified Record pages 29 to 32 incl.

3. The petitioner was tried before a Jury October 30, 1959 in the Municipal Court of Los Angeles Judicial District, No. 98050, on three counts of alleged violation of Section 2141 of the Business and Professions Code; Court IV, an alleged violation of Section 4143 of the Business and Professions Code, was dismissed, the acts constituting the alleged crime being the giving of an injection with a hypodermic, syringe and needle and giving a vaccination on three separate occasions. Certified Record page 32.

4. The petitioner was found guilty of the three counts and was on November 10, 1959 sentenced to serve six months on Count I and pay a fine of $500.00 on both Counts II and III, or serve an additional 100 days on each of said Counts if the fines were not paid. Previous to sentence, petitioner applied for probation which was denied. Certified Record line 26, page 32, to line 14, page 33.

5. That petitioner appealed from the conviction and from the orders denying the motion for new trial and motion for probation. Certified Record lines 15 to 18, page 33.

6. That the Appellate Department of the Superior Court of the State of California in case No. CR A 4270, denied the appeal and affirmed the judgment.

7. That a petition for rehearing was filed and on March 14, 1960 the petition was denied. Certified Record line 18, page 33, to line 10, page 34.

8. The Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, is the highest court available to petitioner.

9. In the court of first instance, to wit, the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, the case is completed and the court has no further jurisdiction as the petitioner having been sentenced November 10, 1959 was committed to the City Jail of Los Angeles on April 22, 1960, to serve his sentence. [Certified Record lines 11 to 21, page 34.] On April 22, 1960, a petition for a writ of habeas corpus was filed in the United States District Court, Southern District of California, Central Division, entitled In the Matter of the application of Marvin Dayan, also known as Marvin Dayon, for a Writ of Habeas Corpus, No. 485-60Y, and an order to show cause issued returnable May 2, 1960. The petitioner by order of the Presiding Judge of said court, the Honorable Peirson M. Hall, was released and on May 2, 1960 the Honorable Leon R. Yankwich, Judge presiding, made his order discharging the order to show cause and rendered a judgment of dismissal and gave a stay of execution until May 14, 1960. The court cited the failure of petition to apply for a writ of certiorari to the Supreme Court of the United States as a bar to the granting of the writ. An appeal from the order was filed and $250.00 cash bond posted May 6, 1960. On May 11,

1960, on motion of petitioner, the Honorable Leon R. Yankwich granted a stay of execution and ordered the petitioner to remain at liberty on his own recognizance until final disposition of his case in No. 485-60Y to permit petitioner to file this petition for a writ of certiorari and to ask this Court for a stay of execution pending the review on certiorari. That petitoner is now at liberty on his own recognizance and if this writ is granted, will request a stay of execution pending final disposition of this matter.

10. In the trial of the action the petitioner was denied the right to introduce evidence as to what was taught in Chiropractic Schools or Colleges. Said denial was on the grounds that such evidence was immaterial. Petitioner made an offer of proof that the acts specified by the prosecution as crimes in violation of Section 2141, to wit, hypodermic injections and vaccinations, were within the scope of his license and were taught in the Chiropractic Schools and Colleges as a part of Chiropractic and necessary mechanical, and hygienic and sanitary measures incident to the care of the body, which offer was rejected and denied as immaterial.

11. At the conclusion of the trial the court instructed the jury that any vaccination of a human being and any injection by a hypodermic needle in a human body were violations of Section 2141 of the California Business and Professions Code and that what substance was injected or the purpose of the injection were immaterial.

12. The foreman of the jury requested a definition of the word "hygienic" appearing on the license issued to petitioner by the State Board of Chiropractic Examiners and the Court refused to give any instructions

as to the definition on the grounds that it was immaterial. The above summary is supported by the Certified Record, pages 52 to 74 incl. pertinent portions of which are found in Appendix D at pages 37 to 54.

Set out below are the portions of the Reporter's Transcript supporting the above summary and appear on pages 75 to 78 inclusive of the certified record.

"In a case charging offenses as here, it is the duty of the defendant to show what, if any license has been issued to him to practice any of the healing arts in this State. It is uncontradicted that the defendant is licensed as a Doctor of Chiropractic and is unlicensed as a practitioner in any other of the healing arts.

You are instructed that it is unlawful under the Section here charged for a chiropractor to give a hypodermic injection for the treatment of any ailment, disease or other physical condition. That it is further unlawful for him to sever or penetrate the tissues of human beings. Therefore, if you find beyond a reasonable doubt that the defendant did, on or about September 6th, 1958, give a hypodermic injection or injections, to a human being or human beings, for the treatment of any ailment, disease or other physical condition, then you should find the defendant guilty as charged in Count I.

Also, if you find beyond a reasonable doubt, that the defendant did, on or about the 11th day of October, 1958, give a hypodermic injection or injections to a human being or human beings, for the treatment of any ailment, disease or other physical condition, then you should find the defendant guilty as charged in Count II.

Also if you find, beyond a reasonable doubt, that the defendant did, on or about October 29th, 1958, give a hypodermic injection or injections to a human being or human beings for the treatment of any ailment, disease or other physical condition, or if you find beyond a reasonable doubt that on or about October 29th, 1958, the defendant vaccinated a human being or human beings, then you should find the defendant guilty as charged in Count III.

Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and will sign the verdict to which you may agree. In order to return a verdict it is necessary that all the jurors agree to the decision. As soon as all of you have agreed upon verdicts, you shall have them signed by your foreman and then return with them to this room.

Swear the Bailiff.

(Whereupon the jury left the courtroom to begin its deliberations at 11:34 A.M. on this date.)

Los Angeles, California, Monday November 2, 1959: 12:02 P.M.

The Court: Mrs. Warner, the jurors have asked for some clarification. If you will be seated, we will get them out and see if we can help them in any respect.

(Whereupon at 12:03 P.M., on this date, the Jury returned to the courtroom.)

The Court: In the matter of the People against Marvin Dayan, I would address myself, if I may, to the Foreman of the Jury. I am advised, sir that some clarification is requested or needed by the Jury in its deliberations. Is that correct?

Foreman of the Jury: On one part of the license.

The Court: What do you wish to know?

Foreman of the Jury: Do you want me to state it?

The Court: Whoever is the foreman I would like to have state what you need that you think will be helpful in your deliberations, sir.

Foreman of the Jury: If we can just read over the license itself.

The Court: Don't you have it? Do you want it?

Foreman of the Jury: May I see the license?

The Court: I don't know how much more specific the Court can be than the Court has been to you. It makes no difference what the license says. I have instructed you that if he gave injections or if he vaccinated a person he is guilty of this offense, even though he be a licensed chiropractor. Now, how much clearer one can be on that than that I don't know. That is what I have told you. That is what the law is.

You are bound to follow it whether you like it or not or whether you like what the license says or not. It isn't your job to take the license and attempt to interpret what it means. You may see it, of course, if you want it. I don't see how it is going to help you any.

Foreman of the Jury: Actually the term on the license was "hygienic—"

The Court: I don't care what the license says or what the term "Hygienic," means. It should have no meaning to you in the deciding of this case I

have instructed you as succinctly and completely as I know how and as simply as I know how or what the law is, as I understand it, and as I have instructed you. A chiropractor may not give injections by hypodermic needle nor may he vaccinate persons. I have told you that if you find, beyond a reasonable doubt, either of those things, on the dates indicated, then you are to find him guilty.

How much more succinctly can I put it? I would think with that you should be able to arrive at a verdict. I will ask you to go back and deliberate or do whatever it is you have attempted to do."

(Reference to Certified Record.)

The pertinent portions of the certified record supporting the above summary are found on pages 2 to 5 inclusive and 29 to 38 inclusive of the certified record and in Exhibits A to F inclusive, appearing at pages 42 to 79 inclusive of the certified record.

In addition to this petition, petitioner has filed in this Court a Petition for Writ of Certiorari to review the judgment of the Appellate Department of the Superior Court and will move this Court for a consolidation under Rule 43, Subsection 5, Rules of Supreme Court.

## VI.

## Petitioner Held Solely by Virtue of Judgment of Municipal Court.

That petitioner is not held in custody by virtue of any complaint, indictment, presentment, warrant or quarantine law, rule, regulation; arrest or order, with the exception of the judgment of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, aforesaid.

## VII.

### Manner in Which Federal Questions Were Raised.

The Federal question, being the denial to petitioner of due process of law and the denial of equal protection of the law guaranteed to petitioner by the 14th Amendment to the Constitution of the United States, was raised at all pertinent steps of the proceeding in the State Court by:


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|---|---|
| (a) The complaint, Certified Record, page 41, Appendix C | 32 |
| (b) Offers of proof by petitioner of evidence necessary to his defense which offers were rejected by the trial court and were not considered by the jury, Certified Record, pages 51-75, Appendix D | 37 |
| (c) Statement on Appeal, Certified Record, pages 43-48 incl., Appendix D | 55 |
| (d) Instructions to Jury on motion of court, Certified Record, pages 75-78, Appendix D | 59 |
| (e) Petition for Writ of Habeas Corpus and Points and Authorities in support thereof, Certified Record, pages 2 to 21 incl., Appendix A | 2 |
| (f) Memorandum Opinion of Appellate Department of Superior Court, Certified Record, page 49, Appendix A | 19 |

## Reasons for Granting This Writ.

**The Federal Questions Herein Have Been Properly Raised and Passed Upon At All Stages of the Proceedings. No Adequate Non-Federal Ground Was Used as a Basis for Respondent's Court Decision.**

The constitutional question was presented in time and was raised at all steps of the proceedings in the State Courts, to wit, by demurrer in the trial court, by offers of evidence rejected and by jury instructions given on motion of the trial court, see Appendix D; in the Appellate Department of the Superior Court by the Statement on Appeal and Briefs filed, by the Memorandum Opinion of the Court, and the Certificate of the Presiding Judge of the Appellate Court.

There are no independent grounds existing upon which the State Courts could have found the petitioner guilty without considering the constitutional question and violating petitioner's constitutional rights guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The question involved concerns more than the rights of petitioner, it concerns all Doctors of Chiropractic in the State of California who are now made subject to the State Board of Medical Examiners through prosecution under Section 2141 of the Medical Practice Act rather than under the control of the State Board of Chiropractic Examiners as provided in the Initiative Chiropractice Act and Sections 1000 and 1001 of the Business and Professions Code.

The State Courts have refused to limit the scope of Section 2141 to unlicensed persons, thus destroying the property rights and liberty of the Doctors of Chiro-

practic contrary to the 14th Amendment of the United States Constitution.

To petitioner's knowledge this is the first time this important question concerning the application of Section 2141 to Doctors of Chiropractic has come before this Court.

Petitioner was charged, tried, convicted and sentenced for an alleged violation of Section 2141 of the California Business and Professions Code which reads as follows:

> "Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

At the time of the arrest and at the present time and at the time of the alleged criminal acts, petitioner held an unrevoked license from the California State Board of Chiropractic Examiners giving him the right "to practice Chiropractic in the State of California as taught in Chiropractic Schools or Colleges; and . . . authorized to use all necessary mechanical, and hygienic, and sanitary measures incident to the care of the body, as provided by law."

> Exhibit F, page 79 of Certificate Record, appearing in Appendix C, *infra*, at page 35.

This license was issued pursuant to Section 7 of the Initiative Chiropractic Act codified in West's Annotated California Codes as Section 1000-7 of California Business and Professions Code, and reads as follows:

> "License to practice, issuance; practice authorized. One form of certificate shall be issued by the board of chiropractic examiners, which said certificate shall be designated "License to practice chiropractic," which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included *in materia medica*."

Section 1000 of the California Business and Professions Code reads as follows:

> "Law governing. The law governing practitioners of chiropractic is found in an initiative act entitled 'An act prescribing the terms upon which licenses may be issued to practitioners of chiropractic, creating the State Board of Chiropractic Examiners and declaring its powers and duties, prescribing penalties for violation hereof, and repealing all acts and parts of acts inconsistent herewith,' adopted by the electors November 7, 1922."

The above Section states that the law governing practitioners of chiropractic is the Chiropractic Initiative Act which is complete in itself to regulate the practice of Chiropractic as taught in Chiropractic Schools or

Colleges and also to regulate the practice by Doctors of Chiropractic of all necessary mechanical, and hygienic and sanitary measures incident to the care of the body and to punish Doctors of Chiropractic if they practiced medicine, surgery, osteopathy, dentistry or optometry or used any drug or medicine now or hereafter included *in materia medica.*

The alleged criminal acts charged were the giving of hypodermic injections and vaccinations. Count IV, charging possession of a hypodermic syringe and needle, was dismissed because of the provisons of Section 4052 of the Business and Professions Code, exempting physicians and surgeons, dentists, chiropodists, etc. and chiropractors from the Pharmacy Act, Section 4143, which restricts the sale and possession of hypodermic needles and syringes to certain persons.

No evidence was introduced by the prosecution as to what constituted the practice of medicine or surgery or whether or not Vitamin B-12 or polio vaccines and smallpox vaccines were drugs and medicine included *in materia medica* and were used for the purpose of curing disease or ailment as required by the Medical Practice Act and the Chiropractic Act as interpreted by the case of *People v. Fowler*, 32 Cal. App. 2d Supp. 737, the basis of the California State Courts interpretation of the Medical Practice Act and the Chiropractic Act resulting in the application of Section 2141 to Chiropractors.

In the *Fowler* case the Appellate Department of the Superior Court in the Opinion of Judge Shaw in 13 pages of legal dissertation without any statement of the facts, except that the defendant Fowler violated Section 2141, lays down the ground rules for prosecution of Chiropractors under Section 2141, as follows:

1. In a criminal charge it is not necessary to negative an exception or proviso which is not a part of the definition or description of the offense, therefor.

   (a) A charge that a person practiced a mode or system of healing without a license from the Medical Board is sufficient without stating that the defendant charged does not have a license from the Chiropractic Board though possession of the license is a complete defense to the charge as long as the defendant has not exceeded his authority. (Page 742 *Fowler* case.)

The above assumption of the Court that it is not necessary to negative an exception or proviso which is not a part of the definition or description of the offense falls of its own weight in this case, for the reason that the definition of the crime under Section 2141 does not state any offense against Chiropractors. To convict a Chiropractor of a crime of operating beyond the scope of his license, the prosecution has to prove a violation of the Chiropractic Act or under the theory of the *Maggiagli* case and the *Fowler* case, the defendant Chiropractor has to prove that he did not do any acts outside of the scope of his Chiropractic License.

This assumption of the court violates the express language of Section 1000 of the Business and Professions Code which states that the practitioner of Chiropractic is governed by the Chiropractic Act and violates Section 18 of the Chiropractic Act (Section 1000-18 Business and Professions Code) which repeals all parts of the Medical Practice Act in conflict with the Chiropractic Act.

Furthermore, this holding of the court throws the burden of proving his innocence on the defendant Doctor of Chiropractic because the court by taking on the provision that the defendant in addition to proving possession of the license, must go one step further and prove that he was acting within the scope of his license as defined by the *Fowler* case.

This is a denial of due process and equal protection of the law because the defendant charged must prove his innocence rather than the State proving him guilty of the crime charged.

2. Having stated the mere possession of a license from the Chiropractic Board is not a complete defense unless the defendent also proves that he did not exceed the scope of his license, the Court proceeds to define the scope of the license as follows:

(a) The practice of Chiropractic is defined in the *Fowler* case by taking the definition of Chiropractic appearing in Webster's Standard Dictionary circa 1922, see page 746 *Fowler* case, and being defined as system or mode of treating disease by manipulation of the spine chiefly by hand. Having defined "chiropractic" to its satisfaction, the court disposes of the language of Section 7 of the Chiropractice Act "which license shall authorize the holder thereof to practice chiropractic, etc. as taught in chiropractic schools or colleges" by stating on page 747 of the *Fowler* case that the teaching in the chiropractic schools and colleges as defining the scope of the license must be limited to the selection of the various methods of manipulating the spine!

As a result of this position taken by the Court, it is not necessary to resort to extrinsic evidence as to what is taught in chiropractic schools or colleges to define the limits of "Chiropractic" and therefore no evidence need be introduced at the trial as to what is taught in Chiropractic Schools or Colleges, as any act on the prescribed lists of acts contained in Section 2141, outside of manipulating the spine chiefly by hand is automatically a violation of Section 2141 of the California Business and Professions Code unless the acts charged are permitted under the second part of the Chiropractice License, to wit, "the use of all necessary mechanical, and hygienic and sanitary measures incident to the care of the body."

3. The Court in the *Forder* case defines the second part of the license as follows on page 747:

> "The second part of the authorization contained in section 7 of the act, 'to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body', is not a definition of, but an addition to, chiropractic as used in the previous part of section 7 and authorizes chiropractors to use measures which would not otherwise be within the scope of their licenses."

In summing up its position, the Court at page 748 said:

> "In other words, the chiropractor is limited to the practice of chiropractic and the use of mechanical, hygienic and sanitary measures incident to the care of the body, which do not invade the field of medicine and surgery, irrespective of whether or not additional phases of the healing art, including medicine and surgery or the use of drugs, may have been taught in chiropractic schools or colleges."

By this position the Court forces the defendant to prove that the act charged does not constitute the practice of medicine or surgery nor the use of drugs and medicine now or hereafter included *in materia medica*.

The Court on page 751 of the *Forder* case defines *materia medica* as follows:

> "1. Material or substance used in the composition of remedies:—a general term for all substances used as curative agents in medicine. 2. That branch of medical science which treats of the nature and properties of all the substances employed for the cure of diseases; one of the two branches of pharmacology."

Thus the *Forder* case is committed to the position that the substance used by the Doctor of Chiropractic in his practice must not be for the cure of a disease for the reason that the prohibited substances in Section 7 of the Chiropractic Act are the use of "drugs and medicines" found in "materia medica."

Accordingly, if a substance is used for purposes other than the cure of a disease "it is not banned by Section 7 or the *Forder* case.

The case at bar is concerned with the second part of the Chiropractic license, *i.e.*, the use of "all necessary mechanical, and hygienic and sanitary measures incident to the care of the body." (hereinafter referred to as part two of the license), and the prohibition contained in Chapter 7 against the "practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter contained in materia medica." (hereinafter referred to as the prohibitory portion of the license.)

What constitutes part two of the license and the prohibitory portion of the license must necessarily be determined by extrinsic evidence. The burden of proof is on the prosecution to prove that the defendant was not practicing part two of his license as taught in Chiropractic Schools or Colleges and that the acts which he did violated the prohibitory portion of Section 7 of the Chiropractic Act.

In the case at bar the petitioner was not permitted to introduce evidence as to what he was taught in Chiropractic Colleges or what was taught in such colleges attended by him, neither was he permitted to introduce evidence as to what substances he injected in the prosecution's witnesses with the hypodermic needle or the purpose of the injection, nor was he allowed to introduce evidence that the giving of a hypodermic injection for polio or B-12 as a food supplement or vaccination were health measures and were permitted by part two of his license.

The jury was instructed that if petitioner gave a hypodermic injection or vaccinated the witnesses, he was guilty of violating Section 2141. The prosecution did not introduce any evidence that what the petitioner did was a violation of part two of his license or that it violated the prohibitory section of Chapter 7 of the Chiropractic Act, the prosecution merely relied on the case of *People v. Mangiagli*, 97 Cal. App. 2d Supp. 935, which purports to follow the *Fowler* case, but states that the practice of Chiropractic is limited to what matters were taught in 1922, the time of the passage of the Chiropractic Act. The Court goes further then the *Fowler* case and states on page 939 that the practice of chiropractic is limited to the methods of manipulating the spine as taught in 1922.

The Court also on pages 939 and 940 limits part two of the Chiropractic License by merely stating that the acts charged, to wit, the administration of blood plasma and the injection of liver extract are not such mechanical, hygienic or sanitary measures incident to the care of the body, when done for the treatment of ailment, disease, or other physical condition and on page 940 in the *Mangiagli* case the court in this language destroys the whole basis of the conviction in the *Mangiagli* case, to wit, that the defendant in said case practiced medicine.

> "Defendant contends that what he did is not the practice of medicine or surgery, and seems to assume that if it is not, he may engage in it under his chiropractic license. Even if this premise were conceded, the conclusion would not necessarily follow. The reference in the part of section 7 of the Chiropractic Act numbered above as (3) to medicine, surgery, and the other matters listed with them, is not positive but negative. It declares that chiropractic licensees shall not engage in certain practices, but does not imply, and section 7 does not provide, that such licensees may engage in every sort of practice not listed as forbidden. (Compare the reasoning in In re Rust (1919) 181 Cal. 73, 79 (183 P. 548).) As we held in People v. Fowler, *supra*, 32 Cal. App. 2d Supp. 750, this provision is merely a limitation upon the two authorizing clauses (1) and (2)."

In order to convict Doctors of Chiropractic for violation of Section 2141, it is necessary to go to Section 7 of the Chiropractic Act for a definition of the crime charged as Section 2141 does not prohibit the practice of medicine or surgery, nor the use of drugs and medicine now or hereafter found *in materia medica*. Petitioner con-

tends that Section 2141 lists specific acts applying to all modes or systems of healing but applies only to persons who are unlicensed in the healing arts.

*People v. Mills*, 74 Cal. App. 353.

Also in the cases of *Evans v. McGranaghan*, 4 Cal. App. 2d 202 and *In re Hartman*, 10 Cal. App. 2d 213, the Courts held that extrinsic evidence is necessary to determine the meaning of Chiropractic.

The limitations attempted to be placed on the practice of Chiropractic do not stand up in the light of the educational requirements contained in Sections 5 and 6 of the Act which are practically the same curriculums required of physicians and surgeons and the number of hours of instructions are the same.

In the case at bar there is no proof that petitioner violated the scope of his Chiropractic License or that he violated Section 2141. The fact that petitioner held a good unrevoked license from the Chiropractic Board is a complete defense to a charge of an alleged violation of Section 2141 and upon production of the license, the Court should have dismissed the case.

If there was any crime committed, it would have to be an act or acts violating the Chiropractic Act, not Section 2141. The petitioner was not charged with a violation of the Chiropractic Act.

On the basis of the above, the rule in the cases of *People v. Mills*, 74 Cal. App. 353, *Thompson v. Louisville*, 4 L. Ed. 2d No. 9 (April 11, 1960) 654, 659 and *Talley v. California*, 4 L. Ed. 2d No. 8 (March 28, 1960) 559, 561 and *In re Newborn*, 53 A. C. 789, 799, 800, *England v. Lousiana State Board of Medical Examiners*, 259 F. 2d 626, and *Hewitt v. State Board of Medical Examiners*, 148 Cal. 590, would indicate that the writ requested should have issued.

## Conclusion.

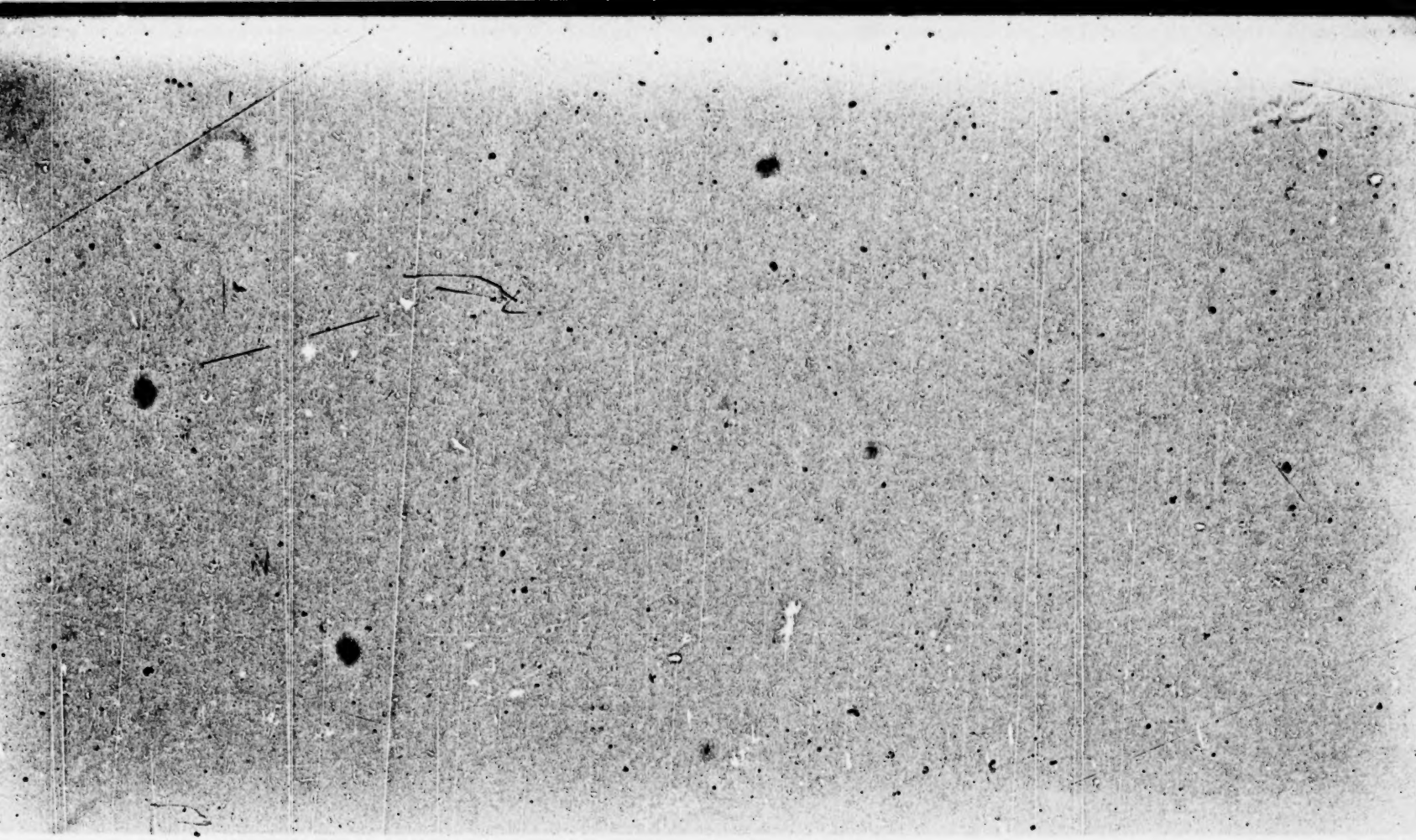
For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

NATHAN NEWBY, JR.,
*Counsel for Petitioner.*

NATHAN NEWBY, JR.,
*Counsel of Record.*

Dated: June 27, 1960.



## APPENDIX A.

(Page 123 of Certified Record)

Order Denying Writ of Habeas Corpus, Criminal No. 6642.

In the Supreme Court of the State of California in Bank.

In re Dayan on Habeas Corpus.

Petition for writ of habeas corpus Denied.

Filed April 20, 1960.

William I. Sullivan, Clerk. By: S. F. Deputy.

GIBSON, *Chief Justice.*

(Pages 1 to 21 of Certified Record)

In the Supreme Court of the State of California.

In the Matter of the Application of Marvin Dayan, also known as Marvin Dayon, for a Writ of Habeas Corpus.

## Petition for Writ of Habeas Corpus and Points and Authorities.

*To the Honorable Chief Justice and to the Associate Justices of the Supreme Court:*

The petition of Marvin Dayan, a Doctor of Chiropractic, respectfully shows:

I.

THAT HE IS UNLAWFULLY CONSTRUCTIVELY IMPRISONED, DETAINED, CONFINED AND RESTRAINED OF HIS LIBERTY BY WILLIAM H. PARKER, CHIEF OF POLICE OF THE CITY OF LOS ANGELES, BY REASON OF THE FACTS AS HEREINAFTER SET FORTH.

1. Petitioner was unlawfully arrested by reason of the effect and operation of a warrant of arrest issued by the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, in a criminal proceeding entitled, The People of the State of California, plaintiff, v. Marvin Dayan, defendant, No. 98050.

That the misdemeanor complaint filed in said action, a copy of which is attached to the appendix as Exhibit A, charged petitioner herein, a licensed Chiropractor, in Counts I, II and III with having violated Section 2141 of the Business and Professions Code (Medical Practice Act) and in Count IV of having violated Section 4143 of the Business and Professions Code. During the trial

Count IV was dismissed and defendant was tried, found guilty and sentenced for violations of Counts I, II and III.

2. Petitioner upon his arrest May 5, 1959, was released on bail and before trial made a series of applications for Writs of Habeas Corpus, as follows:

(a) Application to the Superior Court of the State of California, in and for the County of Los Angeles, No. HC-65873, for a Writ of Habeas Corpus, which was granted and upon the hearing discharged and defendant went to trial. The trial was continued; and

(b) Original application for a Writ of Habeas Corpus was filed in the District Court of Appeal, Second Appellate District, division Two, No. 6798, and was denied.

(c) Petition in the Supreme Court of the State of California after decision in the District Court of Appeal denying petition for Writ of Habeas Corpus. The Supreme Court denied the petition.

3. Petitioner was then unlawfully tried before a jury.

4. That petitioner after said trial moved for a new trial which was denied and then was unlawfully sentenced to serve six months on Count I, and to pay a fine of $500.00 on both Counts II and III—or to serve an additional 100 days on each of said Counts II and III consecutively, if the said fines were not paid. Petitioner previous to sentence orally applied for probation which motion was denied.

5. That petitioner appealed from the conviction and from the orders denying the motion for new trial and motion for probation.

6. That the Appellate Division of the Superior Court of the State of California, No. 98050, denied the appeal and affirmed the judgment.

7. That a petition for rehearing was filed and on March 14, 1960 the petition was denied.

8. That the remittitur was returned from the Appellate Division of the Superior Court on March 16, 1960 and the petitioner ordered to appear March 30, 1960 in Division 1 of the Municipal Court before Honorable Parks Stillwell, Judge presiding, and at said time on motion of petitioner, execution of the judgment was stayed until midnight, April 11, 1960, and petitioner released on his own recognizance.

9. That on April 6, 1960 petitioner filed an application for Writ of Habeas Corpus in the District Court of Appeal, Second District, and on April 11, 1960 said petition was denied without comment. Upon motion of pettioner the Honorable Parks Stillwell stayed execution of judgment until midnight, April 22, 1960, to permit petitioner to file an application with the Supreme Court of the State of California, for a Writ of Habeas Corpus.

10. That petitioner is now unlawfully in constructive custody of William H. Parker, Chief of Police of the City of Los Angeles, County of Los Angeles, California, and unless this petition is granted and the Writ of Habeas Corpus issued, petitioner will unlawfully be in actual custody of William H. Parker on April 22, 1960, unlawfully confined in the City Jail of Los Angeles.

11. That attached hereto and made a part hereof, to which reference is made, is a copy of the entire petition to the District Court of Appeal, State of California, Second Appellate District, Division Two, No. 7168, for a Writ of Habeas Corpus and Points and Authorities.

That contained in said appendix are Exhibits A to F, as follows:

Exhibit A Complaint

Exhibit B Proposed Statement on Appeal

Exhibit C Memorandum of the Appellate Department of the Superior Court

Exhibit D Order Denying Rehearing

Exhibit E Portions of the Reporter's Transcript

Exhibit F Photocopy of License to Practice Chiropractic.

II.

THAT THE ILLEGALITY OF THE ARREST, IMPRISONMENT DETENTION, CONFINEMENT AND RESTRAINT OF PETITIONER IS AS FOLLOWS, TO WIT:

1. The complaint, Exhibit A, does not state facts sufficient to constitute a public offense, in that the petitioner as a Chiropractor is not subject to arrest, imprisonment, detention and confinement or subject to be tried for any alleged violation of Section 2141 of the Business and Professions Code.

2. That Section 2141 of the Business and Professions Code applies only to unlicensed persons and does not apply to anyone holding an unrevoked license from either of the following State Boards:

(a) State Board of Medical Examiners

(b) State Board of Osteopathic Examiners

(c) State Board of Chiropractic Examiners

That petitioner at the time of the alleged acts committed by him for which he was arrested, tried and convicted

was and now is, a licensed Chiropractor holding an unrevoked license from the State Board of Chiropractic Examiners.

3. That petitioner under the license issued by the State Board of Chiropractic Examiners could lawfully perform and do each and every act complained of and set forth in Section 2141 of the Business and Professions Code and proved at the trial.

4. That Section 2141 of the Business and Professions Code when applied to any person other than a person not licensed by the three State Boards above mentioned is unconstitutionally vague, uncertain and incapable of being uniformly enforced because it fails to set forth any standard of what acts as applied to Chiropractors constitute the practice of medicine or surgery and by its terms leaves to the individual judge and jury the determination of the meaning of the law as well as what proven facts render the accused guilty or innocent.

5. That the State Legislature in the enactment of Section 1000 of he Business and Professions Code declared that practitioners of Chiropractic are governed solely by the Chiropractic Act and not section 2141 of the Business and Professions Code which it states is repealed by Section 18 of the Chiropractic Act, an initiative act, insofar as it conflicts with the Chiropractic Act.

6. That petitioner was not tried for a violation of Section 2141 of the Business and Professions Code but was tried for a violation of a constructive crime created by the Appellate Division of the Superior Court of the

State of California, in and for the County of Los Angeles, by virtue of its decisions in the following cases.

*People v. Fozzler*, 32 Cal. App. 2d Supp. 737;

*People v. Maugiagli*, 97 Cal. App. 2d Supp. 935.

7. That the arrest, trial and conviction of petitioner, a licensed Chiropractor, for alleged violations of Section 2141 of the Business and Professions Code is unconsitutional as violating Article I, Section 11 and Section 13 of the Constitution of the State of California, and the Fourteenth Amendment of the Constitution of the United States.

8. That at the trial of the action petitioner was denied a trial by jury in that the Judge presiding so intimidated and instructed the jury that the jury was not permitted to exercise its impartial judgment and were given what amounted to as an instructed verdict.

9. That the Court permitted the witnesses for the prosecution to testify as to pertinent facts going to the elements of the alleged crime and denied the petitioner the right to refute and contradict said evidence on the grounds that the proposed testimony of the petitioner was immaterial. That the action of the Court in this respect denied the petitioner due process of law and equal protection of the law and violated Sections 11 and 13 of Article I of the State Constitution and the Fourteenth Amendment of the Constitution of the United States.

10. That the Judge refused to permit the petitioner to introduce any evidence as to what was taught in Chiropractic Schools and Colleges as provided in Sec-

tions 5, 6 and 7 of the Chiropractic Act or to introduce any evidence as to what petitioner studied in the Chiropractic Schools and Colleges attended by him and denied the petitioner the right to introduce any evidence as to whether or not the acts complained of were within the scope of his Chiropractic license and instructed the jury that any injection by a hypodermic needle was a violation of Section 2141 of the Business and Professions Code which amounted to a directed verdict and took from the jury the right to determine whether or not the petitioner was guilty of the crimes alleged.

II. That attached to the application of Marvin Dayan in the appendix is Exhibit E, being portions of the Reporter's Transcript in the trial of petitioner before the Honorable Parks Stillwell. That said Exhibit E demonstrates the unfairness of the trial court's conduct of the trial over which he presided and substantiates petitioner's accusation that he was denied his constitutional rights.

## III.

### Petitioner Held Solely by Virtue of Judgment of Municipal Court

That petitioner, is not held in custody by virtue of any complaint, indictment, presentment, warrant or quarantine law, rule, regulation, arrest or order, with the exception of the judgment of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, aforesaid.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus issue herein, directed to William H. Parker Chief of Police, commanding him to have the said petitioner before this Court at a time and place therein to be specified, to do and receive what shall then and there be considered by said court concerning petitioner, together with the time and cause of his detention, and said Writ; and that petitioner be discharged and restored to his liberty.

That pending the final determination of this Court, the bail of petitioner be fixed by this Court.

MARVIN DAYAN,
MARVIN DAYAN,
*Petitioner.*

NATHAN NEWBY, JR.
NATHAN NEWBY, JR.
*Attorney for Petitioner.*

State of California, County of Los Angeles—ss.

Marvin Dayan being by me first duly sworn, deposes and says:

That he is the petitioner in the above entitled action; that he has read the foregoing Petition for Writ of Habeas Corpus and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

MARVIN DAYAN.
MARVIN DAYAN.

Subscribed and sworn to before me this 12th day of April, 1960.

NATHAN NEWBY, JR.
*Notary Public in and for said County and State.*

## Points and Authorities in Support of Application For Writ of Habeas Corpus.

### I.

### Statement of Case

On May 5, 1959 petitioner, Dr. Marvin Dayan, D.C., a Doctor of Chiropractic and graduate of the Los Angeles College of Chiropractic, was arrested and charged in three counts with the three violations of Section 2141 of the Business and Professions Code, which reads as follows:

> "Practice attempt or advertising without certificate as misdemeanor. Any person, who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement disorder injury or other mental or physical condition of any person without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdeameanor."

At the trial of the case before a jury in Division 23 of the Municipal Court for Los Angeles Judicial District, Honorable Parks Stillwell, Judge presiding, the alleged criminal acts testified to by the witnesses for the prosecution consisted in giving hypodermic injections and vaccinations.

The prosecution's witnesses testified that the petitioner told them that the injections were for polio. The petitioner

admitted the giving of the injections but denied that they were for polio and denied that he told the witnesses they were for polio. Petitioner offered to prove that the injections were vitamins given as a food supplement for malnutrition and further offered to prove that the giving of hypodermic injections of food supplements and vaccinations for small pox were taught in the Los Angeles Chiropractic College an accredited school as necessary hygienic and sanitary measures incident to the care of the body.

The trial judge refused the offer and denied petitioner the right to prove what was taught in Chiropractic Schools and Colleges or what he was taught in the Los Angeles College of Chiropractic and refused testimony of the faculty of said College as to what was taught in said college.

The license issued to petitioner by the State Board of Chiropractic Examiners has the following on its face:

> "To Whom These Presents Shall Come, Greetings: Marvin S. Davan, D. C. having qualified by law, is by this Certificate authorized to practice Chiropractic in the State of California as taught in chiropractic schools or colleges; and is also authorized to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, as provided by law."

The trial judge instructed the jury that if they found that the petitioner vaccinated the prosecuting witnesses or gave them hypodermic injections that they must find the petitioner guilty of a violation of Section 2141 of the Business and Professions Code. None of the so-called criminal acts claimed by the prosecution are found in Section 2141 of the Business and Professions Code.

The petitioner was found guilty and sentenced to serve six months in jail on Count I and fined Five Hundred Dollars on each of the other two Counts or to serve 100 days each consecutively if the fines were not paid.

Petitioner applied for probation which was denied.

An appeal was taken to the Appellate Division of the Superior Court and was denied and the judgment affirmed.

A petition for rehearing was filed, heard and denied.

The petitioner was given a stay of sentence to April 11, 1960, by the trial judge to permit him to file an application for a Writ of Habeas Corpus to the District Court of Appeal, Second Appellate District, Division Two. The application No. 7168 was filed April 6, 1960 and on April 11, 1960 the Court denied the application without comment. Fox *P.J.* signed the order.

On April 12, 1960 the trial judge gave petitioner an additional stay of execution of sentence until April 22, 1960 to permit petitioner to file an application to this Honorable Court for a Writ of Habeas Corpus.

Unless the Writ is issued or an Order to Show Cause is issued, petitioner will be in actual custody April 22, 1960, of the Chief of Police of the City of Los Angeles, William H. Parker. That petitioner is now released on his own recognizance.

Attached hereto as an appendix is the complete application No. 7168 filed in the District Court of Appeal, which is made a part of this application.

Said application contains the following points of law and supporting cases. The details of said points and authorities are found under like headings in Points and Authorities found in the appendix starting on page 13 of the same and are not repeated here.

The Court's attention is respectfully called to these Points and Authorities:

I.

HABEAS CORPUS IS PROPER REMEDY WHERE PETITIONER IS IN CONSTRUCTIVE CUSTODY.

*In Re Petersen* (1958), 51 Cal. 2d 177 at 181.

II.

HABEAS CORPUS IS A PROPER REMEDY TO ATTACK A JUDGEMENT OF CONVICTION OBTAINED IN VIOLATION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

*In Re Winchester*, 53 A. C. 534, at page 537:

*Ex Parte McNulty*, 77 Cal. 164 at pages 166 and 167:

*Ex Parte Kearny*, 55 Cal. 215.

III.

SECTION 2141 BUSINESS AND PROFESSIONS CODE DOES NOT APPLY TO CHIROPRACTORS.

*People v. LaBarre*, 193 Cal. 388, 391 and 392.

IV.

SECTION 2141 APPLIES ONLY TO UNLICENSED PERSONS.

*People v. Mills*, 74 Cal. App. 353, 357.

V.

SECTION 2141 IS CONSTITUTIONALLY VAGUE AND UNCERTAIN WHEN APPLIED TO CHIROPRACTORS.

*In re Newbern*, 53 A. C. 789, 799, 800;

*Evans v. McGranaghan*, 4 Cal. App. 2d 203, 204, 205.

## VI.

APPLICATION OF SECTION 2141 TO CHIROPRACTORS DENIES THEM EQUAL PROTECTION OF LAW AND DUE PROCESS GUARANTEED BY ARTICLE I AND SECTIONS 11 and 13 OF THE STATE CONSTITUTION AND 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

*Cooper v. State Board of Medical Examiners*, 35 Cal. 2d 242, 247, 248;
*Sutter Basin Corp. v. Brozen*, 40 Cal. 2d 235, 247;
*Ray v. Parker*, 15 Cal. 2d 275, 281, 282;
*People v. Gilliland*, 39 Cal. App. 2d 250, 266;
*People v. Noggle*, 7 Cal. App. 2d 14, 19;
*Dribin v. Superior Court*, 37 Cal. 2d 345, 352;
*County of Los Angeles v. Hurlbut*, 44 Cal. App. 2d 88, 94;
*Oosterveen v. Board of Medical Examiners*, 112 Cal. App. 2d 201, 210.

### A.

DENIAL OF EQUAL PROTECTION OF LAW

*In San Jose Ranch Co. v. San Jose etc. Co.*, 126 Cal. 322, 326;
11 Cal. Juris 2d 783, Sec. 310;
*Cooper v. State Board of Medical Examiners*, 35 Cal. 2d 242, 247, 248.

### B.

DENIAL OF DUE PROCESS

*Lanzetta v. New Jersey*, 59 S. Ct. 618, at 453;
*In re Blaney*, 30 Cal. 2d 643 at 653;
*Lorenson v. Superior Court*, 35 Cal. 2d 49, at 60;
*Warner v. Kenny*, 27 Cal. 2d 627, 629.

## VII.

### Petitioner was Tried for Violation of a Constructive Crime Created by the Courts

The constructive crime was created in the case of *People v. Fowler*, 32 Cal. App. 2d Supp. 735 and the case of *People v. Mangiagli*, 97 Cal. App. 2d Supp. 935.

*Ex Parte McNulty*, 77 Cal. 164, 167, denounces constructive crime.

To the same effect as *Ex Parte McNulty*, see *Hewitt v. Board of Medical Examiners*, 148 Cal. 590, and *In re Twing*, 188 Cal. 261, 265.

## VIII.

### In Petitioner's Trial in the Municipal Court He was Denied a Fair and Impartial Trial

See pages 48 to 53 inclusive of appendix for details.

## Conclusion.

The petitioner respectfully calls to the attention of this Honorable Court that he is charged with a violation of Section 2141 of the Business and Professions Code which does not contain the words "medicine or surgery" nor "hypodermic injection" nor "vaccination" and that in the trial his crime was defined by an alleged violation of Section 7 of the Chiropractic Act on the theory that he violated the scope of his license but petitioner was denied the right to introduce evidence as to the scope of his license or as to the purpose of the injections.

Even the *Mangiagli* case relied upon by the trial court holds that the injection must be for the purpose of curing an ailment.

On the People's theory polio and vaccinations are for the prevention of disease, not the cure of disease and hence are health measures or in medical terms hygienic and sanitary measures incident to the care of the body and within the scope of petitioner's license.

Petitioner also calls to the attention of the Court that the whole foundation of the People's case against petitioner is the *Fozeler* case, *i.e.*, *People v. Fozeler*, 32 Cal. App. 2d Supp. 737. This case is 14 pages long and there is not *one* statement of fact. It is all dicta. On page 739 the Court says: "The facts are stated in the opinion of the court." But there are no facts stated except that the defendant was charged with a violation of Section 2141 of the Business and Professions Code in the words of the statute and that defendant was a Chiropractor and had a right to do what he did under his Chiropractic License.

What did the defendant do?

No one knows.

Yet we have 14 pages of the legal philosophy of Judge Shaw on the practice of chiropractic in California, all *obiter dictum*.

Respectfully submitted,

NATHAN NEWBY, JR.

NATHAN NEWBY, JR.

State of California, County of Los Angeles—ss.

Mary M. Winnie being first duly sworn, says: That affiant, whose address is 517 H. W. Hellman Building, Los Angeles 13, California, is a citizen of the United States, a resident of the county where the herein described mailing took place; over the age of 18 years and not a party to the above entitled action. That affiant served the attached Petition for Writ of Habeas Corpus and Points and Authorities on the City Attorney of Los Angeles, attorney for People of the State of California and Chief of Police, William H. Parker, in said action, by placing a true copy thereof in an envelope addressed as follows:

Roger Arnebergh, City Attorney
Los Angeles 12, California
c/o Samuel C. Palmer, III, Deputy
Room 40, City Hall

sealed and deposited on the 12th day of April, 1960, in the United States Mail at 354 S. Spring St., Los Angeles, California, with postage fully prepaid thereon, and there is regular communication by mail between the place of mailing and the place so addressed.

MARY M. WINNIE.

Subscribed and sworn to before me this 12th day of April, 1960.

NATHAN NEWBY, JR.
*Notary Public in and for said County and State.*

**Unreported Opinion of Appellate Department of Superior Court of the State of California, Dated March 2, 1960.**

(Page 49 of Certified Record)

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Superior Court No. CR A 4270. People of the State of California, Plaintiff and Respondent, vs. Marvin Dayan, Defendant and Appellant. Trial Court No. 98050. On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, Parks Stillwell, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgments and orders appealed from made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

MEMO.

The trial judge correctly instructed the jury that a chiropractor may not give injections by hypodermic needle. *Brown v. Guy* (1956), 144 Cal. App. 2d 659 at 666; *Newhouse v. Board of Osteopathic Examiners* (1958), 159 Cal. App. 2d 728 at 732; *People v. Mangiagli* (1950), 97 Cal. App. 2d Supp. 935 at 940.

Those cases and *People v. Machado* (1929), 99 Cal. App. 702, *People v. Mills* (1925), 74 Cal. App. 353, In re Hartman (1935), 10 Cal. App. 2d 213, *People v. Fowler* (1938), 32 Cal. App. 2d Supp. 737, and *People v. Mansfield* (1940), CR A 1749, dispose of all issues raised. It should be noted that even the *Mills* case contains the qualifying language "and it be found that he is following the system used by chiropractors." Pg. 357. The limited nature of the license not only justifies that qualification but also answers the contention that chiropractors are denied the equal protection of the law.

March 2, 1960.

SMITH
*Judge*

We concur:

SWAIN
*Presiding Judge*

HUIS
*Judge*

**Order of Appellate Department of Superior Court of the State of California Denying Petition for Rehearing.**

(Page 50 of Certified Record)

In the Appellate Department of the Superior Court, County of Los Angeles, State of California.

People of the State of California, Plaintiff and Respondent, vs. Marvin Dayan, Defendant and Appellant. Superior Court No. CR A 4270. Trial Court No. 98050. Order denying rehearing.

The petition of appellant for a rehearing after judgment of this court on appeal in the above-entitled case having been filed and having been duly considered,

Said petition is hereby denied.

MEMO

All issues were considered and disposed of by this court.

Dated: March 14, 1960.

By the Court

SWAIN
*Presiding Judge*

HULS
*Judge*

SMITH
*Judge*

## APPENDIX B.

Texts of Statutes referred to:

Section 1000. Law governing. The law governing practitioners of chiropractic is found in an initiative act entitled "An act prescribing the terms upon which licenses may be issued to practitioners of chiropractic, creating the State Board of Chiropractic Examiners and declaring its powers and duties, prescribing penalties for violation hereof, and repealing all acts and parts of acts inconsistent herewith," adopted by the electors November 7, 1922.

Section 1001. Director. In each year, the State Board of Chiropractic Examiners shall compile and may thereafter publish and sell a complete directory of all persons within the State who hold unforfeited and unrevoked certificates to practice chiropractic, and whose certificate in any manner authorizes the treatment of human beings for diseases, injuries, deformities, or any other physical or mental conditions.

The directory shall contain:

(a) The following information concerning each such person:

1. The name and address of such person.
2. The names and symbols indicating his title.
3. The school, attendance at which qualified him for examination or admission to practice.
4. The date of the issuance of his certificate.

(b) The annual report of the board for the prior year.

(c) Information relating to other laws of this State and the United States which the board determines to be of interest to persons licensed to practice chiropractic.

(d) Copies of opinions of the Attorney General relating to the practice of chiropractic.

(e) Copy of the provisions of this chapter and copy of the act cited in Section 1000.

The board may require the persons designated in this section to furnish such information as it may deem necessary to enable it to compile the directory. Every person so designated shall report immediately each and every change of residence, giving both his old and new address.

The directory shall be evidence of the right of the persons named in it to practice unless his certificate to practice chiropractic has been canceled, suspended or revoked. The board may collect from each person who voluntarily subscribes to or purchases a copy of the directory the cost of publication and distribution thereof; except that one copy of the directory shall be distributed without charge to each certificate holder of the board.

Section 4052. Exceptions in general.

(b) This chapter does not apply to the sale of any intravenous solution of 150 cubic centimeters or over; cold sterilizing solutions, sterilized sutures; hypodermic needles and syringes; sterile distilled water U. S. P.; sterile normal saline solution; laboratory chemicals and reagents, stains and dyes; chemicals and drugs used as indicators in diagnostic and X-ray examinations, soaps, detergents and tincture of green soap U. S. P.; medicinal gases, ether, chloroform and ethyl chloride; sulfa creams, ointments; and jellies used for introduction into the vaginal tract; and medicated dressings; where such sale is made to any of the following:

1. A physician, dentist, chiropodist, veterinarian, pharmacist, medical technician or medical technologist holding

a currently valid and unrevoked license to practice his profession; and a chiropractor acting within the scope of his license.

Section 4057. Products excepted

Nothing in this chapter shall apply to or interfere with the sale at wholesale or retail by grocers, dealers, persons who are not registered pharmacists, and other vendors generally without restriction of the following articles, whether or not they are otherwise exempted from the provisions of this chapter by Section 4052 or otherwise referred to therein: vitamin or mineral products or combinations thereof, dietary foods or food supplements, foods or other nutrients for dietary uses when any of such articles are sold to supplement or fortify the ordinary or usual diet of man or other animal or poultry and are labeled accordingly, and when such articles meet the requirements of the Federal Food, Drug and Cosmetic Act and the food laws of the State of California; Glauber salt, petroleum jelly, turpentine, cod-liver oil, milk of magnesia, condition powers, cream of tartar, carbonate of soda, bay rum, essence of peppermint, ammonia, alum, castor oil, bicarbonate of soda, chloride of lime, glycerin, witch hazel, sheep dip, borax, sulfur, aspirin tablets, gauze bandage, mineral oil, sterile cotton, medicated adhesive and corn plasters, peroxide of hydrogen, 10 volume, bluestone, copperas, flaxseed, insect powder, flypaper, unmedicated corn plasters, unmedicated adhesive plasters, epsom salts, saccharin, and poultry vermifuge.

Section 1000-1. Board of examiners, membership, appointment, qualifications, per diem expenses. A board is hereby created to be known as the "state board of chiropractic examiners," hereinafter referred to as the board which shall consist of five members, citizens of the State

of California, appointed by the governor. Each member must have pursued a resident course in a regularly incorporated chiropractic school or college, and must be a graduate thereof and hold a diploma therefrom.

Each member of the board first appointed hereunder shall have practiced chiropractic in the State of California for a period of three years next preceding the date upon which this act takes effect, thereafter appointees shall be licentiates hereunder. No two persons shall serve simultaneously as members of said board, whose first diplomas were issued by the same school or college of chiropractic, nor shall more than two members be residents of any one county of the state. And no person connected with any chiropractic school or college shall be eligible to appointment as a member of the board. Each member of the board except the secretary, shall receive a per diem of ten dollars for each day during which he is actually engaged in the discharge of his duties, together with his actual and necessary traveling expenses incurred in connection with the performance of the duties of his office, such per diem traveling expenses and other incidental expenses of the board or of its members to be paid out of the funds of the board hereinafter defined and not from the state's taxes.

Section 1000-4. Powers of board. POWERS OF BOARD. The board shall have power:

(a) To adopt a seal, which shall be affixed to all licenses issued by the board.

(b) To adopt from time to time such rules and regulations as the board may deem proper and necessary for the performance of its work, copies of such rules and regulations to be filed with the Secretary of State for public inspection.

(c) To examine applicants and to issue and revoke licenses to practice chiropractic, as herein provided.

(d) To summon witnesses and to take testimony as to matters pertaining to its duties; and each member shall have power to administer oaths and take affidavits.

(e) To do any and all things necessary or incidental to the exercise of the powers and duties herein granted or imposed.

(f) To determine minimum requirements for teachers in chiropractic schools and colleges.

(g) To approve chiropractic schools and colleges whose graduates may apply for licenses in this State. Any school meeting the requirements of Section 5 of this act and the rules and regulations adopted by the board shall be eligible for such approval.

(h) The board may employ such investigators, clerical assistants, and other employees as it may deem necessary to carry into effect the provisions of this act, and shall prescribe the duties of such employees.

Section 1000-5. License to practice, application, fee, certificate, educational requirements, LICENSE TO PRACTICE: FEE: EDUCATIONAL REQUIREMENTS. It shall be unlawful for any person to practice chiropractic in this State without a license so to do. Any person wishing to practice chiropractic in this State shall make application to the board 15 days prior to any meeting thereof, upon such form and in such manner as may be provided by the board. Each application must be accompanied by a license fee of twenty-five dollars ($25) and a certificate showing good moral character of the applicant. Except in the cases herein otherwise prescribed, each applicant shall be a graduate of an approved chiropractic

school or college which teaches a course of not less than 4,000 hours, extended over a period of four school terms of at least nine months each, and shall present to the board at the time of making such application a diploma from a high school, or proof, satisfactory to the board, of education equivalent in training power to a high school course.

The schedule of minimum educational requirements to enable any person to practice chiropractic in this State is as follows, except as herein otherwise provided:

| | |
|---|---|
| Group 1 | |
| Anatomy, including embryology and histology | 18 to 20% |
| Group 2 | |
| Physiology | 6 to 8% |
| Group 3 | |
| Biochemistry, inorganic and organic chemistry | 6 to 8% |
| Group 4 | |
| Pathology and bacteriology | 10 to 12% |
| Group 5 | |
| Public Health, hygiene and sanitation | 3 to 4% |
| Group 6 | |
| Diagnosis, pediatrics, dermatology, syphilology and psychiatry | 12 to 18% |
| Group 7 | |
| Obstetrics and gynecology | 3 to 4% |
| Group 8 | |
| Principles and practice of chiropractic, physiotherapy and office procedure | 25 to 28% |
| Total | 83 to 100% |
| Electives | 17 to 0% |

Section 1000-6. Board of examiners, meetings, offices, examinations. (a) The board shall meet as a board of examiners on the first Tuesday following the second Monday of January and July of each year, and at such other times and places as may be found necessary for the performance of their duties. The office of the board shall be in the city of Sacramento. Sub-offices may be established in Los Angeles and San Francisco, and such records as may be necessary may be transferred temporarily to such sub-offices. Legal proceedings against the board may be instituted in any one of said three cities.

(b) Each applicant shall be designated by a number instead of the name, so that the identity will not be disclosed to the examiners until the papers are graded.

(c) All examinations shall be in writing, except in cases herein otherwise prescribed, and shall be practical in character, as taught in chiropractic schools or colleges, and designed to ascertain the fitness of the applicant to practice chiropractic. Said examinations shall be in each of the subjects as set forth in section five hereof. A license shall be granted to any applicant who shall make a general average of seventy-five per cent, and not fall below sixty per cent in more than two subjects or branches of said examination. Any applicant failing to make the required grade shall be given credit for the branches passed, and may, without further cost, take the examination at the next regular examination on the subjects in which he failed. For each year of actual practice since graduation the applicant shall be given a credit of one per cent on the general average.

Section 1000-7. License to practice, issuance; practice authorized. One form of certificate shall be issued by the board of chiropractic examiners, which said certificate

shall be designated "License to practice chiropractic," which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica.

Section 1000-15. Noncompliance with and violations of act. Any person who shall practice or attempt to practice chiropractic, or any person who shall buy, sell or fraudulently obtain a license to practice chiropractic, whether recorded or not, or who shall use the title "chiropractor" or "D. C." or any word or title to induce, or tending to induce belief that he is engaged in the practice of chiropractic, without first complying with the provisions of this act; or any licensee under this act who uses the word "doctor" or the prefix "Dr." without the word "chiropractor," or "D. C." immediately following his name, or the use of the letters "M. D." or the words "doctor of medicine," or the term "surgeon," or the term "physician," or the word "osteopath," or the letters "D. O." or any other letters, prefixes or suffixes, the use of which would indicate that he or she was practicing a profession for which he held no license from the State of California, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than two hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than ninety days, or both.

Section 1000-18. Repeal of conflicting provisions in medical practice act. Nothing herein shall be construed

as repealing the "medical practice act" of June 2, 1913, or any subsequent amendments thereof, except in so far as that act or said amendments may conflict with the provisions of this act as applied to persons licensed under this act, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed.

Section 4143. Unauthorized possession; exceptions

(a) It is unlawful for any person to have in his possession or under his control any hypodermic needle or hypodermic syringe.

(b) The provisions of this section do not apply to persons who have acquired possession and control of a hypodermic needle or hypodermic syringe in accordance with the provisons of this code authorizing the regulating the sale, possession and use of such needles and syringes.

(c) The provisions of this section do not apply to any person who owns or is engaged in the breeding or raising of livestock, poultry, or other animals to which hypodermic injections are customarily given in the interest of health safety, or good husbandry.

14TH AMENDMENT TO THE CONSTITUTION OF UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF CALIFORNIA

Article 6. Section 4

Supreme Court; jurisdiction

Sec. 4. The Supreme Court shall have appellate jurisdiction on appeal from the superior courts in all cases in equity, except such as arise in municipal or justices' courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine also in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself of the Supreme Court or before any District Court of Appeal, or before any justice thereof, or before any Superior Court in the State, or before any judge thereof.

## APPENDIX C.

### Complaint.

(Page 41 of Certified Record)

Personally appeared before me, the undersigned, who, first being duly sworn, complains and says: That on or about September 6, 1958, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit:

Violation of Section 2141 of the Business and Professions Code of the State of California was committed by Marvin Dayon (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully in the City of Los Angeles, practice and attempt to practice, and advertise and hold himself out as practicing, a system and mode of treating the sick and afflicted without having at the time of so doing a valid unrevoked certificate issued by the Board of Medical Examiners of the State of California, or the Board of Osteopathic Examiners of said State, authorizing him so to do.

COUNT II.

For a further, separate and second cause of action, being a different offense connected in its commission with the offense set forth in Count I hereof, affiant complains and says: That on or about October 11, 1958, at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to wit: Violation of Section 2141 of the Business and Professions Code of the State of California was committed by Marvin Dayon (whose true name to affiant is unknown), who at the time

and place last aforesaid, did wilfully and unlawfully in the City of Los Angeles, practice and attempt to practice, and advertise and hold himself out as practicing, a system and mode of treating the sick and afflicted without having at the time of so doing a valid unrevoked certificate issued by the Board of Medical Examiners of the State of California, or the Board of Osteopathic Examiners of said State, authorizing him so to do.

COUNT III.

For a further, separate and third cause of action, being a different offense, belonging to the same class of crimes and offenses set forth in Count I and II hereof, affiant complains and says: That on or about the 29th day of October 1958, at and in Los Angeles City, in the County of Los Angeles, State of California, a misdemeanor, to-wit: Violation of Section 2141 of the Business and Professions Code of the State of California was committed by Marvin Dayon (whose true name to affiant is unknown), who at the time and place last aforesaid, did wilfully and unlawfully in the City of Los Angeles, practice and attempt to practice, and advertise and hold himself out as practicing a system and mode of treating the sick and afflicted without having at the time of so doing a valid unrevoked certificate issued by the Board of Medical Examiners of said State of California, or the Board of Osteopathic Examiners of said State, authorizing him so to do.

All of which is contrary to the law in such cases made and provided, and against the peace and dignity of the People of the State of California. Said Complainant therefore prays that a warrant may be issued for the arrest

of said Defendant that he may be dealt with according to law.

Subscribed and sworn to before me on April 24, 1959.

R. O. MERRITT
R. O. Merritt

George J. Barbour, Clerk of the Municipal Court of Los Angeles Judicial District, in said County and State.

By FRANCIS P. O'KEEFE
*Deputy Clerk*

June 11, 1959. I hereby certify this to be a true and correct copy of the original Complaint on file in this office George J. Barbour, Clerk of Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California.

By EDITH RITNER
*Deputy*

License to Practice Chiropractic Issued to Petitioner By State of California.

(Page 79 of Certified Record)

Original License No. 7916, issued Aug. 25, 1951

STATE OF CALIFORNIA

№ 8475

DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS

# STATE BOARD OF CHIROPRACTIC EXAMINERS

## License to Practice Chiropractic

TO WHOM THESE PRESENTS SHALL COME, *Greetings:* Marvin S. Dayan, D C

having qualified by law, is by this Certificate authorized to practice Chiropractic in the State of California as taught in chiropractic schools or colleges; and is also authorized to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, as provided by law.

IN TESTIMONY WHEREOF, THE STATE BOARD OF CHIROPRACTIC EXAMINERS *has granted this License to Practice Chiropractic and caused same to be signed and its seal hereto affixed, this* 28th *day of* May, A.D. 1954.

Raymond C. Fiesen D.C. President

Martin Lawrence Gibson D.C. President

Edward G. Poulter D.C. Secretary

Lucy B. Lee

Thomas J. E. by Lee

Filed in the Office of the County Clerk of Los Angeles County this 1st day of July 19 54

JOHN J. OSTLY, County Clerk.

Marguerite H. Gaule Deputy

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## APPENDIX D.

### Manner in Which Federal Questions Were Raised.

(a) Offers of proof by petitioner of evidence necessary to his defense which offers were rejected by the trial court and were not considered by the jury.

(Pages 51-75 of Certified Record)

Los Angeles, California, Monday, November 2, 1959: 9:30 AM.

The Court: It is stipulated, counsel, that the Jury is present?

Mrs. Warner: Yes.

Mr. Cutler: So stipulated.

The Court: You may proceed, Mrs. Warner, with your defense. Do you care to make an opening statement?

Mrs. Warner: We will proceed with our opening statement. We have three witnesses in the courtroom. May they remain until we start our evidence?

The Court: Surely. Do you have any objection?

Mr. Cutler: Your witnesses may remain; I have no objection.

(Whereupon an opening statement was made by counsel for the defendant, which is not herein transcribed.)

The Court: You may call your first witness.

Mrs. Warner: The defendant will call Mr. Bernhardt as their first witness.

JULES BERNHARDT,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows, to wit:

The Clerk: State your name, please.

The Witness: Jules Bernhardt.

*Direct Examination*

By Mrs. Warner:

Q. What is your business or occupation? A. I am a Doctor of Chiropractic.

Q. How long have you been a Doctor of Chiropractic?

A. Approximately thirteen years.

Q. And what is your present position as a Doctor of Chiropractic? A. Well, I am in practice and also am a faculty member at the Los Angeles College of Chiropractic.

Q. Now, as a member of the faculty of the Los Angeles College of Chiropractic, do you know the various courses offered at the College?

Mr. Cutler: I will stipulate that he is an expert, your Honor.

The Witness: Yes, I do.

Q. By Mrs. Warner: Assuming, for the purposes of this question, that B Complex was administered with a hypodermic syringe for a patient suffering from malnutrition, arising out of acute alcoholism, is this technique taught in the Los Angeles College of Chiropractic?

Mr. Cutler: That is objected to as being immaterial, your Honor.

The Court: Sustained.

Mrs. Warner: We would like to make an offer of proof your Honor.

The Court: Ladies and gentlemen of the Jury, we are not in recess. I will ask you to remain in your places, if you please, until we return from chambers.

I will ask you not to discuss this matter nor to form any conclusions or opinions on it until the matter has finally been submitted to you.

(Whereupon the following proceedings were had in chambers, outside of the presence of the Jury:)

The Court: You may proceed, counsel.

Mrs. Warner: We would offer to prove by the testimony of Dr. Bernhardt, that the giving of a shot of B Complex with a hypodermic syringe is included in the various techniques taught at the Los Angeles College of Chiropractic and that such methods are required by the State Chiropractic Act, Sections 5 and 7, to be taught by said College before the student may be licensed to practice the art of Chiropractic.

Mr. Cutler: I will make my objection that it is immaterial as to what is taught in the school itself, with respect to what the Doctor may do under the license and within the purview of the Medical Practice Act. It is what he is authorized under the law to do, under the license, and under 2141 of the Business and Professions Code of the State of California.

The Court: May I say this, that in my research on this problem, I came to this conclusion: In the case of the People against Mangiagli 97 Cal. App. 2d. Supplement, at page 959, the Court says this:

"As we held in the Fowler case, at 32 Cal. App. 2d. Supplement 750, the limiting clause of Section 7, numbered above as (3), prevents a chiropractic licensee from using drugs or medical preparations or severing or penetrating the tissues of human beings."

It seems to me it has been specifically held that a chiropractor, as such, has no right to give shots or injections of any kind. If that be the case, it would seem to me to be immaterial what they teach in the schools and besides that the law seems to be quite clear that only what was being taught in 1922, when the Chiropractic Act was

adopted, are those things which are included in Section 7 and even some of the things that may have been taught, are excluded also, but what they are teaching now in the Chiropractic colleges would have nothing to do with what a chiropractor may, under the law, perform or do.

Mrs. Warner: As I understand the Prosecutions's objection, then, it is because he believes the evidence is being offered to expand the license, as such; is that correct, Mr. Cutler?

The Court: The evidence is immaterial, it is his contention, to the issues here involved.

It seems to me that the only question involved here, Mrs. Warner, is did he or did he not on these dates indicated give injections or vaccinations. It is my opinion that he is, under the law, forbidden and prohibited from doing either of these acts at any time, as a chiropractor.

Mrs. Warner: It isn't quite as strict as that. Actually he may use any mechanical, hygienic or sanitary measures that are necessary for the healthful maintenance of a body.

The Court: The Courts have specifically held he may not penetrate the tissue.

Mrs. Warner: That is for surgery. The Mangiagli case is an intravenous injection, if you will check it, and I believe you will find that it was an intravenous injection into a vein. There is a great deal of difference between an intravenous injection and one given into the tissues as a food supplement.

The Court: Let me read further:

"But however that may be, it is clear that the other acts done, the administration of blood plasma and the hypodermic injection, when done for the treatment of ailment, disease, or other physical condition, are not such

mechanical, hygienic or sanitary measures incident to the care of the body, as may be used by chiropractic licensees."

Mrs. Warner: Your key matter in the Mangiagli case is there was a diagnosis of a disease and a treatment of a disease.

The Court: Acute alcoholism is not a disease?

Mrs. Warner: No; it is a health problem. It is not considered a disease. Malnutrition is not a disease.

The Court: Are the children alcoholics?

Mrs. Warner: No, it is malnutrition in thier case.

The Court: And it is not a disease?

Mrs. Warner: It is a deficiency of the body. Also, your Honor, under vaccinations, you will find that under the Chiropractic Act, a chiropractor is required to do any public health measures to take any public health measures required, and, as such, a vaccination comes under that Section and also comes under our hygienic and sanitary sections.

The Court: Required by whom?

Mrs. Warner: By law to follow the public health measures.

The Court: Is there anything in the law that requires a person to be vaccinated?

Mrs. Warner: A child must be vaccinated for smallpox before they can enter school.

Mr. Cutler: I will object to that. It is not within the Medical Practices Act or the cases as they now stand.

Mrs. Warner: That is what we contend, on the evidence that we are offering. We are not offering the testimony of Dr. Bernhardt for the purposes of expand-

ing his license. We are offering it to show his intent in giving these injections. We believe that under that theory it becomes very material as to what he was taught in school.

Mr. Cutler: If I may add one other matter, with respect to the intent involved, there is no specific intent involved in the first three counts. It is a crime of general criminal intent. The fact that he did the act is sufficient to establish the intent.

Mrs. Warner: I disagree with that concept of the law.

The Court: It will be my practice here, in this case, to limit the evidence, as I have indicated it, if objections are made. It is my opinion, Mrs. Warner, that no matter what they teach in the Chiropractic schools, no matter what he thought he was doing, if he penetrated human tissue, it is my opinion that he is engaged in the unauthorized practice of medicine, unless he is licensed either as a medical doctor or a doctor of osteopathy.

No matter what his great purpose or altruistic intent, what that may have been, I think the law specifically prohibits a chiropractor from this type of activity.

Mrs. Warner: Would that include the taking of blood?

The Court: My understanding is and I have indicated to Mr. Cutler, and he to me, that as soon as it is indicated or proved that the man is a chiropractor, that he, Mr. Cutler, intends to dismiss Count IV. He feels the Doctor has a right to have this instrument in his posession, if he is a licensed chiropractor. But it is my opinion that he may not use it for the purpose which he allegedly did here.

Mrs. Warner: For penetration of any kind?

The Court: I understand the taking of blood is proper by a chiropractor.

Mrs. Warner: That is a penetration too.

The Court: It would have to be a penetration. I don't think he had any right to give any injections for any purpose, whether they be B Complex vitamins or polio shots or whatever they may have been.

Mrs. Warner: Well, that is our lawsuit.

The Court: We have to take a stand on it and that is my understanding, as I read the cases. I do not claim to be an expert on matters concerning Chiropractic, but apparently, his ability to operate is considerably limited. I gather that this is one of the limitations.

Mrs. Warner: His limitations are by his license and if he is acting within the scope of a hygienic, sanitary or mechanical measure, he is within the scope of his license.

The Court: This case specifically provides it is not one of those. It says "Any hypodermic injection."

I would gather that would be whether muscular or intravenous or whatever it may be.

Mr. Cutler: If I might add, your Honor, the distinction is and my understanding of it is, and this is after talking to the people at the Medical Examiners Board, the distinction between giving an injection and drawing blood is a simple one, in that one involves putting a substance into the body and this is the thing which involves the practicing of an act as a medical doctor. Withdrawing blood is not such a type of a situation and adding any substance to the body is what is particularly the distinction between allowing him to take blood, such as for the purposes of having tests run on it, and adding a substance to the body.

The Court: That will be my holding, whether right or wrong.

Mrs. Warner: We have additional evidence to be offered by the Doctor. Shall we just go through the same procedure?

The Court: However you want to do it to make your record. This is the general procedure that I will follow.

Mrs. Warner: Very well, your Honor.

(Whereupon the following proceedings were had in open court:)

The Court: Let the record show that we are back now in open court and that the Jury is present as before.

You may proceed, Mrs. Warner. If I did not sustain the objection to the offer of proof, I now do so. I thought I did. By implication I guess I did.

Mr. Cutler: Had your Honor ruled on the objection?

The Court: I sustained it and now if I did not do it before I will sustain the objection to the offer of proof.

*Direct Examination* (Continued)

By Mrs. Warner:

Q. Doctor, in your opinion as a Doctor of Chiropractic, is B Complex a type of food supplement, sir?

A. Yes, it is.

Q. And is the giving of B Complex, in your opinion a method of hygienic care of the body?

Mr. Cutler: Just a moment, please. I will object to that as immaterial.

The Court: Read the question, Mr. Reporter.

(Record read.)

Mr. Cutler: May I further, your Honor, state another ground for the objection, in that the question is ambiguous.

The Court: It does not seem to me to be ambiguous. I see no objection to it. It may be answered. The objection is overruled.

The Witness: Yes, it is an hygienic measure.

Q. By Mrs. Warner: Doctor, are methods of vaccination taught in the Chiropractic colleges?

Mr. Cutler: That is objected to as being immaterial.

The Court: Sustained.

Q. By Mrs. Warner: Doctor, is the giving of a vaccination, in your opinion, a hygienic measure? A. Yes.

Mr. Cutler: That is objected to as being immaterial, if the Court please.

The Court: The answer may go out for the purpose of the objection. The objection will be sustained.

The Jury is admonished not to consider it for any purpose.

Mrs. Warner: We would like to make another offer of proof.

The Court: I understand what it will be. The question was asked and the answer was in and it was stricken. Isn't that sufficient?

Mrs. Warner: We will let it go. You may cross-examine.

The Court: You may cross-examine, Mr. Cutler.

Mr. Cutler: No questions.

The Court: You may step down, Doctor.

Mrs. Warner: Dr. Mitchell, please.

LESLIE E. MITCHELL.

called as a witness by and on behalf of the defendant, being first duly sworn, was examined and testified as follows, to wit:

The Clerk: State your name, please.

The Witness: Leslie E. Mitchell.

*Direct Examination*

By Mrs. Warner:

Q. Dr. Mitchell, what is your business or occupation?

A. I am a Doctor of Chiropractic and presently the Registrar of the Los Angeles College of Chiropractic.

Q. How long have you been a Doctor of Chiropractic?

A. Since 1951.

Q. Do you practice here in the State of California?

A. I have practiced here, yes.

Q. Do you know the various courses offered at the College of Chiropractic, the Los Angeles College of Chiropractic? A. I do.

Q. In such courses is the use of a hypodermic needle taught in the school?

Mr. Cutler: That is objected to as being immaterial.

The Court: Sustained.

Mrs. Warner: Your Honor, we will make another offer of proof on this.

The Court: May we assume, counsel, that it will be in the nature of the last one, or do you wish, at this time, to make a separate offer of proof.

Mrs. Warner: If counsel will stipulate that it may be the same as the last offer of proof—

The Court: If you tell us that is your offer of proof he does not have to stipulate to it. You make the same offer of proof from this witness that you made from the last; is that correct?

Mrs. Warner: That is true, yes.

Mr. Cutler: Then I will again object to it as being immaterial.

The Court: The objection is sustained.

Q. By Mrs. Warner: Now, Doctor, in your opinion, as a Doctor of Chiropractic, is a B Complex a food supplement? A. It is, yes.

Q. Is the administration of B Complex a hygienic measure for the care of the body?

Mr. Cutler: That is objected to as being immaterial.

The Court: The objection is overruled. You may answer the question.

The Witness: It is.

Q. By Mrs. Warner: Is the giving of vaccinations, is this also considered to be a hygienic measure?

Mr. Cutler: I will object to that as being immaterial.

The Court: That objection is sustained.

Mrs. Warner: That is all. You may cross-examine.

The Court: You may cross-examine, Mr. Cutler.

*Cross-Examination*

By Mr. Cutler:

Q. Are you familiar with the various things that are listed in Materia Medica?

Mrs. Warner: That is objected to as being incompetent irrelevant and immaterial and as being beyond the scope of the direct examination.

The Court: Sustained.

Mr. Cutler: No further questions.

The Court: You may step down.

Mrs. Warner: Dr. Dayan, will you take the stand, please.

MARVIN S. DAYAN

the defendant herein, called as a witness by and on his own behalf, being first duly sworn, was examined and testified as follows, to wit:

The Clerk: State your name, please.

The Witness: Marvin S. Dayan, D.C.

*Direct Examination*

By Mrs. Warner:

Q. Dr. Dayan, where do you reside? A. In Los Angeles.

Q. What is your business or occupation? A. Doctor of Chiropractic.

Q. How long have you been a Doctor of Chiropractic? A. Since 1951.

Q. What school did you attend, sir?

Mr. Cutler: I will stipulate he is a expert—strike that.

Mrs. Warner: We are not using him for the purposes of expert testimony.

Mr. Cutler: Then I will object to it as being immaterial. What schools he went to would be immaterial.

The Court: Sustained.

Q. Mrs. Warner: Were you licensed by the State of California? A. Yes, I was.

Q. I will show you a framed document that states "State Board of Chiropractic Examiners, License to Practice Chiropractic. Number 8475." and I will ask you to look at that document, sir. Have you examined the document? A. Yes.

Q. Is this your license that was issued by the State Board of Chiropractic? A. Yes, it was. It is, yes.

Mrs. Warner: I would like to offer this into evidence as defendant's Exhbit A.

The Court: May I suggest rather than doing that, that he may have use for it in the future. Why don't you read it into the record.

Mrs. Warner: We would like the Jury to have a right to see the license. We will substitute a photostatic copy.

The Court: Do you have one? If it is in the usual form, may I suggest that it be made available for the Jury's perusal rather than have it introduced into evidence. It has a number and it is easily identifiable. I think it might be made available and not offered.

Mrs. Warner: We will make it available then.

Mr. Cutler: May I read it before the other one is made available?

The Court: Yes, you may read it, counsel.

Q. By Mrs. Warner: Directing your attention to September 6th, October 11th and October 29th, did you have an opportunity on those dates to see Mrs. Wheeler? A. Yes, I did.

Q. And her daughter? A. Yes.

Q. What is her daughter's name? A. Linda.

Q. Did you also see Mrs. Edwards on those dates? A. Yes; I did.

Q. And who else besides Mrs. Edwards? A. Several of her children.

Q. Can you recall which child—

The Court: Or children.

The Witness: Raylette, the one that was here the other day, Ricardo, I believe, and another daughter. I don't recall her name; Rozelle, I believe.

Q. By Mrs. Warner: Now, directing your attention to the office calls of Mrs. Wheeler and her child, Linda, on these three dates, the three office calls, did you make a diagnosis of the problems of Mrs. Wheeler? A. Yes, I did.

Q. And what was your diagnosis? A. Debility, general malnutrition, fatigue, et cetera.

Q. Was that applicable also to the child? A. Yes.

Q. Now, directing your attention to Mrs. Wheeler, what was the cause of the debility and of the malnutrition?

Mr. Cutler: I will object to that as being immaterial. No foundation has been laid. This man is not an expert.

The Court: Mr. Cutler, was there a stipulation that he is licensed as a Doctor of Chiropractic? I think that is ample.

Mr. Cutler: May I have the question reread?

(Record read.)

Mr. Cutler: I will object to that as being immaterial and no foundation having been laid. He is not qualified to give his opinion as to that.

The Court: Overruled. The witness may answer the question.

Q. By Mrs. Warner: Do you remember the question, Doctor? A. I don't believe so.

The Court: It may be read again.

(Record read.)

The Court: "In your opinion," I presume should have been added to that.

The Witness: Chronic alcoholism.

Q. By Mrs. Warner: Now, directing your attention to Mrs. Wheeler's daughter, Linda, what was the cause

of the malnutrition in Linda, in your opinion, Doctor? A. Her general debility and malnutrition was caused from not having the proper food, poor diet, et cetera.

Q. As to Mrs. Edwards, tell us what was, in your opinion, the cause of her problems?

Mr. Cutler: I will object to that question, your Honor.

The Court: It is too broad.

Q. By Mrs. Warner: What was your diagnosis as to Mrs. Edwards, Doctor? A. Fatigue, general tiredness and malnutrition.

Q. Did that apply also to her children? A. To her children, yes.

Q. Were her children underweight? A. Yes; frequent colds and things like that.

Q. Now, Doctor, you have heard Mrs. Wheeler, her daughter, Linda, Mrs. Edwards and her daughter Raylette, testify that they received shots on September 6th, October 11th and October the 29th from you; is that correct, sir? A. That is correct.

Q. What type of shots were given to these witnesses?

Mr. Cutler: That is objected to, your Honor, as also being immaterial.

The Court: Sustained.

Mrs. Warner: We would like to make an offer of proof on that matter.

The Court: Let's do it here at the bench.

(Whereupon the following proceedings were had at the bench:)

Mrs. Warner: We would offer to prove by the testimony of Dr. Dayan that a B Complex injection was given to the four witnesses on the dates in questions and that such was given as a food supplement.

Mr. Cutler: I will make the same objection to the offer of proof as was heretofore made.

The Court: The objection is sustained.

(Whereupon the following proceedings were had in open court:)

Q. By Mrs. Warner: Are you presently being sued by Mrs. Wheeler? A. Yes, I am.

Q. And prior to this lawsuit, were demands made upon you for money? A. Yes.

Q. How much was demanded from you? A. $1,000.

Q. What are you being sued for now? A. $25,000.00.

Q Have you received any payments for your treatment to these people?

Mr. Cutler: That is objected to as being immaterial.

The Court: Sustained.

Q. By Mrs. Warner: Were you threatened by Mrs. Wheeler with a lawsuit if you didn't pay her some money? A. Yes, I was.

Q. And after she made these financial demands upon you, did she then go to the Police? A. Yes.

Q. Doctor, as part of your treatment for these four witnesses, did you administer a B Complex injection to them? A. Yes, I did.

Q. And those injections were administered on September 6th, October 11th and October 29th; is that correct? A. Yes.

Q. Were they given as a food supplement, sir? A. Yes.

Mr. Cutler: I will ask that the answer be stricken for the purpose of making an objection.

The Court: The answer may go out.

Mr. Cutler: It is objected to as being immaterial.

The Court: I will admonish the Jury not to consider it for any purpose. The objection will be sustained.

Q. By Mrs. Warner: Was the administering of B Complex as a food supplement taught to you during your course as a student? A. Yes, it was.

Mr. Cutler: Again I will ask that the answer be stricken for the purpose of making an objection.

The Court: The answer may go out. The jury will be admonished not to consider it for any purpose.

Mr. Cutler: I will object to it on the grounds that it is immaterial and irrelevant.

The Court: The objection will be sustained. I will ask the witness, since we are in an area where objections are being interposed, to kindly let the objection be made before you answer.

The Witness: Yes, your Honor.

Q. By Mrs. Warner: Doctor, when you treated Mrs. Wheeler and her daughter, did you make out any forms for their treatment? A. Yes.

Q. Who were these forms for, Doctor? A. The Los Angeles County Welfare Department.

Q. And were they sent to the County Welfare Department?

Mrs. Warner: Defendant's Exhibit A for identification, that will be the first one. Then this next one could be defendant's Exhibit B. The others, I believe, are just duplicates. Yes, they are just duplicates.

The Court: Let these be marked for identification then as defendant's Exhibit A and B.

The objection will be sustained as to the offer of proof.

(Whereupon the following proceedings were had in open court:)

The Court: You may proceed.

Mrs. Warner: You may cross-examine.

*Cross-Examination*

By Mr. Cutler:

Q. Doctor, you testified that Mrs. Wheeler and Mrs. Edwards and their children received shots on these various dates; is that right? A. That is correct.

Q. Do you mean by that the injection of a substance into the body? A. Yes, I do.

Q. Now, you say you diagnosed Mrs. Wheeler's condition as alcoholism, acute alcoholism? A. She was suffering from malnutrition, debility and fatigue. It was due to alcoholism.

Q. And what method did you use to arrive at this particular deduction?

Mrs. Warner: That is objected to as being irrelevant and immaterial and not covered on direct examination.

The Court: Overruled. You may answer.

The Witness: Examination, primarily a history that she gave, and also a history of Mrs. Edwards, of them both drinking together, et cetera.

Q. By Mr. Cutler: Did you perform any type of scientific tests to arrive at this deduction? A. No, I did not, because the County did not substantiate her eligibility under the Welfare Plan.

Q. Now, I believe you made the statement that after Mrs. Wheeler made her financial demands upon you she went to the Police? A. No, she went to the Medical Board about two months after I received a letter from a lawyer asking me for money.

Q. Do you recall what the contents of that letter was?

Mrs. Warner: Objected to as violating the best evidence rule. It is also immaterial and irrelevant.

The Court: The objection is overruled. You may answer. It calls for a yes or no answer.

(b) Statement on Appeal

(Pages 43 to 48 incl. of Certified Record)

In the Municipal Court of Los Angeles Judicial District County of Los Angeles, State of California.

People of the State of California, Plaintiff and Respondent, vs. Marvin Dayan aka, Marvin Dayon, Defendant and Appellant. No. 98050.

PROPOSED STATEMENT ON APPEAL

Be it remembered that on the 24th day of April, 1959, a complaint was filed herein charging defendant with the violation of Section 2141 Business and Professions Code in Counts I, II, and III, and with a violation of Section 4143 Business and Professions Code, in Count IV, which Count IV was dismissed during the trial. Defendant's demurrer was over-ruled, and he was tried and was convicted by a jury on Counts I, II, and III, presided over by the Honorable Parks Stillwell, Judge Presiding. Defendant's motion for a new trial was denied, and defendant was sentenced to serve six months on Count I, and to pay a fine of $500.00 on both Counts II, and III, or to serve an additional 100 days on each of said Counts II and III, consecutively, if the said fines be not paid. Defendant previous to sentence orally applied for probation which motion was denied.

Defendant appealed from the judgments of conviction, and from the orders denying the motion for a new trial, and the motion for probation.

*Notice Re Rule 4 (a) Rules on Appeal*

The entire trial proceedings including the instructions given to the jury were reported by an official reporter. Defendant has ordered the transcription of the record.

Notice is hereby given that defendant intends to file the reporter's transcript of the evidence and proceedings so reported and to make them a part of this statement. Defendant in reliance thereon, omits any other statement of the evidence and oral proceedings herein.

The prosecution offered and the court received into evidence a single Exhibit consisting of a hypodermic syringe. Exhibit 1. Defendant offered into evidence two photos, Exhibits A and B, for identification, and his Chiropractic License, which offers were refused, except defendant was permitted to refer to said license, but denied the right to exhibit the same to the jury.

That each of the six written instructions given to the jury, were given by the court, on the court's own motion. That no oral instructions were given in the charge to the jury made previous to the retiring of the jury for deliberations. That defendant requested proposed Defendant's Instructions to Jury, numbering 1 to 14, inclusive, and also Additional Jury Instructions Requested by Defendant, numbering 15 to 21, inclusive, all of which proposed instructions were denied by the trial court. That the trial court after the jury retired, on the court's own motion, further instructed the jury orally. Defendant did not request any of the oral instructions that were given to the jury, his request for instructions being denied in its entirety, and defendant did except to, and still does except to the charge as given to the jury.

The foregoing Statement on Appeal was prepared within the time allowed by law, and it with the Reporter's Transcript, correctly sets forth all of the proceedings had in the trial of the above entitled action, and contains all of the evidence offered, heard, and received, and all of the instructions both written and oral that were given to the jury.

GROUNDS OF APPEAL.

I.

The Court erred in overruling the demurrer.

II.

The Court erred in denying the motion for a new trial.

III.

The evidence is insufficient to support the verdicts and judgments of conviction.

IV.

The verdicts were and are contrary to law.

V.

The verdicts were and are contrary to the evidence.

VI.

The Court erred in decisions of matters and questions of law arising during the course of the trial.

VII.

The Court misdirected the jury in matters of law.

VIII.

The Court erred in refusing each and all of the instructions requested on behalf of the defendant.

IX.

The Court erred in overruling the objections of the defendant made at the time to the admission of testimony and evidence against the defendant, and to the admission of testimony taken and received at the trial.

X.

Said judgment of conviction deprived defendant of liberty and property without due process of law for the following reasons:

(a) The complaint does not charge a public offense.

(b) Defendant could lawfully perform each act charged in Counts I, II, and III, of the complaint, by virtue of his chiropractic license.

(c) The trial court deprived defendant of his right to trial by jury, wherein the trial court invaded the province of the jury to acquit, by, in effect, directing a verdict of guilt.

(d) Misconduct of the trial court in brow-beating the jury to convict.

XII.

The sentence passed is excessive, and constitutes cruel and unusual punishment.

XIII.

The court erred in considering matters in aggravation of the sentence in violation of Section 1204 P. C.

Dated: This 16th day of November, 1959.

/s/ BARBARA WARNER
BARBARA WARNER
*Attorney for Defendant and Appellant*

The foregoing statement on appeal was served, filed and prepared within the time allowed by law, and correctly sets forth all of the proceedings had during the trial of the cause, and in conjunction with the reporter's transcript contains all of the evidence offered and received in the trial of said cause, and is this 21st day of November, 1959, settled and allowed as correct.

PARKS STILLWELL
*Judge*

(c) Instructions to Jury on motion of court.

(Pages 75-78 of Certified Record)

Ladies and gentlemen of the Jury, it becomes my duty as Judge to instruct you concerning the law applicable to this case, and it is your duty as Jurors to follow the law as I shall state it to you.

The function of the Jury is to try the issues of fact that are presented by the allegations in the Complaint filed in this Court and the defendant's plea of "Not Guilty."

This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice against him. You must not suffer yourselves to be biased against the defendant because of the fact that he has been arrested for these alleged offenses or because a Complaint has been filed against him or because he has been brought before the Court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach just verdicts regardless of what the consequences of such verdicts may be. Each verdict must express the individual opinion of each Juror.

The Jury is the sole and exclusive judge of the facts and of the weight of evidence, and you are to weigh the facts upon the testimony and other evidence produced or stipulated to here in court. If any facts have been stipulated to, such facts are to be deemed as conclusively proven. If any evidence has been admitted and afterward stricken out, you must disregard the matter so stricken out, entirely, and if either counsel has intimated by questions which the Court has not permitted to be answered, that certain things are, or are not, true, you must disregard such questions and refrain from any inference based upon them. If either counsel has made any statements in your presence concerning the facts in the case other than stipulations, you must be careful not to regard such statements as evidence, but to look entirely to the evidence as produced or stipulated to in ascertaining what the facts are. If either counsel has expressed an opinion as to the guilt or innocence of the defendant, such opinion is to be disregarded.

The jurors are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and determining whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand and consider their relation to the case, if any, together with their degree of intelligence.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, his or her interest in the case, if any, or his or her bias or prejudice, if any, against

one or any of the parties, by the character of his or her testimony, or by contradictory evidence; and the Jurors are the exclusive judges of the credibility of each witness.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty, of the truth of the charge.

The law does not require demonstration, or that degree of proof which, excluding all possibility of error, produces absolute certainty, for such degree of proof is rarely possible. Only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it.

In a case charging offenses as here, it is the duty of the defendant to show what, if any license has been issued to him to practice any of the healing arts in this State. It is uncontradicted that the defendant is licensed as a Doctor of Chropractic and is unlicensed as a practitioner in any other of the healing arts.

You are instructed that it is unlawful under the Section here charged for a chiropractor to give a hypodermic

injection for the treatment of any ailment, disease or other physical condition. That it is further unlawful for him to sever or penetrate the tissues of human beings. Therefore, if you find beyond a reasonable doubt that the defendant did, on or about September 6th, 1958, give a hypodermic injection or injections to a human being or human beings, for the treatment of any ailment, disease or other physical condition, then you should find the defendant guilty as charged in Count I.

Also, if you find beyond a reasonable doubt, that the defendant did, on or about the 11th day of October, 1958, give a hypodermic injection or injections to a human being or human beings, for the treatment of any ailment, disease or other physical condition, then you should find the defendant guilty as charged in Count II.

Also if you find, beyond a reasonable doubt, that the defendant did, on or about October 29th, 1958, give a hypodermic injection or injections to a human being or human beings for the treatment of any ailment, disease of other physical condition, or if you find beyond a reasonable doubt that on or about October 29th, 1958, the defendant vaccinated a human being or human beings, then you should find the defendant guilty as charged in Count III.

Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and will sign the verdict to which you may agree. In order to return a verdict it is necessary that all the jurors agree to the decision. As soon as all of you have agreed upon verdicts, you shall have them signed by your foreman and then return with them to this room.

## Instructions to Jury After Request for Clarification.

(Pages 77 & 78 incl. of Certified Record)

Los Angeles, California, Monday, November 2, 1959: 12:02 P.M.

THE COURT: Mrs. Warner, the jurors have asked for some clarification. If you will be seated, we will get them out and see if we can help them in any respect.

(Whereupon at 12:03 P.M., on this date, the Jury returned to the courtroom.)

THE COURT: In the matter of the People against Marvin Dayan, I would address myself, if I may, to the Foreman of the Jury. I am advised, sir, that some clarification is requested or needed by the Jury in its deliberations. Is that correct?

FOREMAN OF THE JURY: On one part of the license.

THE COURT: What do you wish to know?

FOREMAN OF THE JURY: Do you want me to state it?

THE COURT: Whoever is the foreman I would like to have state what you need that you think will be helpful in your deliberations, sir.

FOREMAN OF THE JURY: If we can just read over the license itself.

THE COURT: Don't you have it? Do you want it?

FOREMAN OF THE JURY: May I see the license?

THE COURT: I don't know how much more specific the Court can be than the Court has been to you. It makes no difference what the license says. I have instructed you that if he gave injections or if he vaccinated a person he is guilty of this offense, even though he be a licensed chiropractor. Now, how much clearer one can

be on that than that I don't know. That is what I have told you. That is what the law is.

You are bound to follow it whether you like it or not or whether you like what the license says or not. It isn't your job to take the license and attempt to interpret what it means. You may see it, of course, if you want it. I don't see how it is going to help you any.

FOREMAN OF THE JURY: Actually the term on the license was "hygienic—"

THE COURT: I don't care what the license says or what the term "Hygienic," means. It should have no meaning to you in the deciding of this case. I have instructed you as succinctly and completely as I know how and as simply as I know how on what the law is, as I understand it, and as I have instructed you. A chiropractor may not give injections by hypodermic needle nor may he vaccinate persons. I have told you that if you find, beyond a reasonable doubt, either of those things, on the dates indicated, then you are to find him guilty.

How much more succinctly can I put it? I would think with that you should be able to arrive at a verdict. I will ask you to go back and deliberate or do whatever it is you have attempted to do.

## APPENDIX E.

### Text of Case of People v. Mansfield, CR A 1749, Superior Court of the State of California, Appellate Department.

In the Appellate Department of the Superior Court County of Los Angeles, State of California.

People of the State of California, Plaintiff and Appellant, vs. J. B. Mansfield, Defendant and Respondent.

MEMORANDUM OPINION

Appeal by defendant from an order of dismissal made by the Justice's Court of San Gabriel Township, C. E. Christopher, Judge. Order reversed.

The statement on appeal and the complementary minutes of the trial court show that upon the filing of the amended complaint the defendant was arraigned and thereupon made the suggestion that the court, of its own motion, dismiss the action. So far as appears—and the minutes go into details—there was no plea entered, no waiver of a jury trial, no jury impanelled, and it affirmatively appears that the stipulation was "for the purpose of hearing the motion." We conclude that the trial of the case had not been entered upon, the defendant had not been put in jeopardy; and the people's appeal is authorized.

The fundamental error in the reasons given for the order of dismissal appears in the recital, in the order itself, "that the things charged as against this defendant are the things prohibited under the said Chiropractic Act, a penalty being provided therein for any violation thereof. . . ." Nowhere in the Chiropractic Act (Act 4811, Deering's Gen'l Laws 1937) is it declared to be unlawful to do any of the acts charged against the de-

fendant. One finds the commission of those acts declared to be a misdemeanor in section 2141 of the Business and Professions Code or nowhere.

The fault of the argument supporting the order lies in the interpretation placed upon section 7 of the Chiropractic Act, which, after stating that a license to practice chiropractic authorizes certain acts, continues: "but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry . . . ." The language does not permit of the interpretation that its provisions make it unlawful for the holder of a chiropractor's license to practice optometry, for example. If sections 3000-3152 of the Business and Professions Code were repealed, so that generally there was no restriction on the practice of optometry, could it be seriously argued that section 7 of the Chiropractic Act made it a public offense for holders of chiropractic licenses to practice optometry? All that the concluding words of section 7 purport to do is make it clear that the authority of the license referred to in the section does not authorize the licentiate to engage in the named practices, which are prohibited by other statutes.

Section 1000 of the Business and Professions Code serves no function other than to "complete the record." It makes no attempt to enlarge the scope of the Chiropractic Act. If it were given the effect which is attempted to be accorded it, it would follow that one licensed to practice chiropractic would be governed only by the Chiropractic Act respecting the practice of dentistry and of veterinary medicine. Such an interpretation is obviously untenable.

The contention that chiropractors are denied the equal protection of the law, if the present complaint is held

good, is in essence an attack upon the principle that an exception need not be negatived in a complaint. But, as pointed out in People v. Fowler (1938) 32 Cal. App. (2) 737, 84 P. (2) 326, and again in People v. Tilkin (1939) 34 Cal. App. (2) 743, 90 P. (2) 148, 151, this principle is one of universal recognition; this court may not deny it. The only question open for consideration by us is whether or not the principle so thoroughly established was properly applied in People v. Fowler. Further consideration of this question has not caused us to change our opinion. We hold that the complaint before us states a public offense and that it was error to dismiss the complaint. The order of dismissal is reversed.

BISHOP
*Judge*

Dated December 13, 1940.

I concur in the foregoing opinion, but desire to add to it my conclusion that, aside from the effect of respondent's claim of discrimination upon the rule against negativing exceptions in a criminal pleading, that claim lacks substance. In effect, the discrimination to which he points is that, under the statute as construed by us, one holding a chiropractor's license may be charged with doing an act which is authorized by that license, without mentioning such license in the complaint, and thus compelled to make his defense by producing his license, whereas one holding a license under the medical practice act or the osteopathic act cannot be put in that predicament because of the necessity of negativing his possession of such license in the complaint. This claim assumes that an unfounded charge will be brought against a chiropractor, but not against holders of the other licenses mentioned. This is not the proper basis for considering the question of discrimination. We must assume

the same situation in each case, that is, that an unfounded charge is made. Thereupon, in each case, regardless of the form of the complaint, the defendant will be put to the necessity of making his defense and presenting his license, for the allegations of want of licenses, being negative allegations of matters peculiarly within the knowledge of the defendant, need not be proved by the prosecution. People v. McClain (1934) 2 Cal. App. (2d) (Supp.) 751, 758, and cases there cited. The only real difference between the two cases, then, is that one making an unfounded charge against the holder of a medical or osteopathic license must swear to an untrue statement and thus possibly (but not necessarily) commit perjury, whereas an unfounded charge against a licensed chiropractor may be made without the maker so involving himself. A statutory discrimination which depends for its existence on the assumption that an unwarranted criminal charge will be made and prosecuted and operates only to facilitate somewhat the doing so against one class of persons as compared with others, seems to me too unsubstantial to support a holding that any defendant is deprived of the equal protection of the laws.

SHAW
*Presiding Judge.*

I agree with my Associates generally in their conclusions excepting insofar as they hold that the complaint states a public offense. Because I believe it fails to state any public offense I dissent from the order made.

The complaint charges the defendant with practicing "a system or mode of treating the sick or afflicted . . . without having at the time of so doing a valid, unrevoked certificate from the Board of Medical Examiners of the State of California, or a valid, unrevoked certificate from the Board of Osteopathic Examiners of the State of

California." There is nothing in the complaint to show that the defendant did any act which the holder of a valid, unrevoked certificate from the Board of Chiropractic Examiners could not lawfully do, nor is it alleged that he had no such certificate.

In order to ascertain the status of the law and that a criminal offense has been committed in "practicing a system or mode of treating the sick or afflicted" it is just as necessary to consider the Chiropractic Act as it is the Medical Practice or Osteopathic Acts. As it was essential in People v. Tilikin (1939) 34 Cal. App. (2) 743 to consider the several sections of the City Picketing Ordinance in order to ascertain the status of the law and that an offense had been committed, so is it necessary here.

Consistency should not be regarded as merely a jewel for courts to admire but as a necessity of life for justice to conserve.

Since the complaint does not state a public offense the order should be affirmed.

SCHAFER
*Judge.*

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

Dated: May 24, 1960

HAROLD J. OSTLY, COUNTY CLERK AND CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

By: H. B. CRAIG

*Deputy*